(25,140)

# SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1917.**

## No. 103.

JOSEPHUS WELLS, APPELLANT,

*vs.*

DANIEL C. ROPER, FIRST ASSISTANT POSTMASTER GENERAL OF THE UNITED STATES.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

INDEX.


| | Original. | Print |
|---|---|---|
| Caption | 1 | 1 |
| Transcript of record from the supreme court of the District of Columbia | 1 | 1 |
| Caption | 1 | 1 |
| Bill of complaint | 1 | 1 |
| "Exhibit A"—Contract between United States and Wells, February 14, 1913 | 6 | 6 |
| "Exhibit B"—Cancellation of contract | 12 | 12 |
| Stipulation as to evidence | 12 | 12 |
| "Exhibit 3" to bill—Letter, January 27, 1915 | 13 | 13 |
| "Exhibit 4" to bill—Form of proposals | 13 | 13 |
| "Exhibit 5" to bill—Bid submitted | 14 | 15 |
| Order of injunction | 15 | 15 |
| Motion to dismiss | 15 | 16 |
| Opinion, McCoy, J. | 16 | 16 |
| Motion to restore and continue injunction pending appeal | 23 | 23 |


JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 23, 1917.

| | Original. | Print |
|---|---|---|
| Affidavit in opposition to reinstatement of injunction | 24 | 24 |
| Entry overruling motion to restore and continue the injunction | 25 | 25 |
| Decree | 25 | 25 |
| Exception and appeal noted | 25 | 25 |
| Memorandum: Bond of plaintiff on appeal approved and filed | 26 | 26 |
| Assignments of error | 26 | 26 |
| Designation of record | 26 | 26 |
| Additional designation of record | 27 | 27 |
| Clerk's certificate | 27 | 27 |
| Minute entry of argument and submission | 28 | 28 |
| Opinion, Shepard, C. J. | 29 | 28 |
| Judgment | 33 | 35 |
| Petition for appeal | 34 | 35 |
| Assignment of error | 35 | 36 |
| Order allowing an appeal | 36 | 37 |
| Bond on writ of error | 37 | 37 |
| Citation and service | 38 | 38 |
| Clerk's certificate | 39 | 39 |

1 Court of Appeals of the District of Columbia.

No. 2820.

JOSEPHUS WELLS, Appellant,

vs.

DANIEL C. ROPER, &c.

Supreme Court of the District of Columbia.

In Equity. No. 33195.

JOSEPHUS WELLS, Plaintiff,

vs.

DANIEL C. ROPER, First Assistant Postmaster General of the United States, Defendant.

UNITED STATES OF AMERICA,
*District of Columbia, ss:*

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

*Bill.*

Filed January 27, 1915.

In the Supreme Court of the District of Columbia.

In Equity. No. 33195.

JOSEPHUS WELLS, Plaintiff,

vs.

DANIEL C. ROPER, First Assistant Postmaster General of the United States, Defendant.

Plaintiff states as follows:

1. The plaintiff, Josephus Wells, is a citizen of the United States and a resident of the District of Columbia and brings this suit in his own right.

2 2. The defendant, Daniel C. Roper, is a citizen of the United States and a resident of the District of Columbia; is

First Assistant Postmaster General of the United States and is sued as such.

3. On or about the 14th day of February A. D. 1913, the plaintiff and the United States of America entered into a contract in writing and print duly executed and signed by both said parties, a copy of which is hereto attached, marked Ex. "A", and made a part hereof the same as if literally copied herein.

4. On or about the said 14th day of February A. D. 1913 both the said parties entered upon the performance of said contract according to its terms. The plaintiff has at all times complied with every duty and obligation and with all the duties and obligations on his part to be performed under said contract and with every demand or requirement requested of him by the United States of America under said contract.

5. The United States of America has at all times as the same became due under said contract fully paid the plaintiff, according to the terms of said contract, for the equipment and services rendered by the plaintiff under said contract.

6. The plaintiff has never been guilty of any failures or delinquencies under said contract; the plaintiff has never violated the postal laws or the postal regulations.

7. It is not now, and never has been claimed or pretended by the United States of America or by any person or officer whatsoever that the plaintiff, or any one in -is behalf, has at any time or in any respect failed in the performance of any of his duties or obligations under said contract.

It is not now, and never has been claimed or pretended by the United States of America or by any person or officer whatsoever that the plaintiff, or any one in his behalf, has been guilty of any delinquency in the performance of any obligation or stipulation of said contract.

It is not now, and never has been claimed or pretended by the United States of America or by any person or officer whatsoever that the plaintiff, or any one in his behalf, has violated the postal laws or the postal regulations.

It is not now, and never has been claimed or pretended by the defendant that the plaintiff, or any one in his behalf, has been guilty of failures or delinquencies, or that plaintiff, or any one in his behalf, has violated the postal laws or postal regulations. Equipments and service as specified and described in said contract are still necessary to and required by the Post Office Department at Washington, D. C. and will be necessary to and required by the said Department at said place all the time up to and including the 14th day of February 1917. The form and phraseology of said contract was prepared by the United States of America.

8. The plaintiff is ready, able, willing and anxious to carry out and complete the said contract and every duty and obligation and stipulation thereto on his part to be performed, according to the terms of the said contract.

9. The defendant has no power, right or authority, either
3 as First Assistant Postmaster-General or in any other capacity to cancel said contract or any part thereof. Yet the de-

fendant has threatened to and will, unless restrained by the Court, unlawfully, willfully and wrongfully interfere between the plaintiff and the United States of America in the carrying on and execution of said contract; in order, as he, the defendant, says "to conduct in Washington, D. C., an experimental combined screen wagon and City collection and delivery service".

In pursuance of his unlawful plan and purpose as aforesaid to deprive the plaintiff of his benefit of the said contract, the defendant has, unlawfully and without any power or authority, undertaken to order that said contract be cancelled in a letter directed to the plaintiff, a copy of which is hereto attached, marked Ex. "B." and made a part hereof the same as if literally copied herein.

At the taking effect of the contract, the plaintiff was required by the United States of America to purchase five (5) new automobiles and their equipment for use under said contract, and he did at that time purchase five (5) new automobiles at a cash cost to him of $9,250. In order to carry out said contract to the satisfaction of the United States of America, the plaintiff was at the same time required, and he did, construct and equip a garage and repair shop in which to house, repair and keep in first class condition the said five (5) automobiles. The cash cost to the plaintiff of constructing a building into a garage with the necessary fire proofing and sewerage required by the regulations of the District of Columbia was $2,535; the necessary cash cost to the plaintiff for equipping the garage and machine shop, including electric wiring, electric motor, lathe, tools, air pump, shafting and pulleys, emery wheel, forge, oil tank, fire extinguishers, and electric light contract, was $1,120; in addition to which and necessary to the performance of said contract by the plaintiff he has paid out in cash for fire insurance premiums, liability insurance premiums, bond to the Government, for gasoline, lubricating oil, salaries, repainting and revarnishing said five (5) automobiles, $12,799; the reasonable rental value for his garage building for the two year- last past devoted to said contract is $1,200; the reasonable value for his own time and services for the two years last past devoted to the execution of said contracts is $4,000.

In order to enable himself to acquire the equipment necessary for the execution of said contract, the plaintiff borrowed the sum of $11,000 in money; devoting all of it to that purpose and has paid interest, in addition to the expenditures above named, at the rate of 6% per annum on his said loan, a large amount of which is still owing and unpaid and will become due in February 1915; his only means of payment must be derived from and are through the contract with the United States of America aforesaid; that he is a young man, who has succeeded in establishing a small grocery store and grocery trade in which he has made a modest living for himself and his family. If this said contract with the United States of America is interfered with by the defendant and he, the plaintiff, and the
4 United States of America prevented from carrying it out and he, the plaintiff, deprived of its advantages, or its performance even temporarily interfered with he will be rendered insolvent, his

credit will be destroyed, his business will be wholely broken up and his prospects in life blasted.

The aforesaid building, which he constructed into, and equipped as, a garage only for the purpose of executing said contract, is first class for that purpose but utterly unfit for any other purpose; it is situated in the South East section of Washington City in a locality where there is no use for and no demand for automobile garages; and if plaintiff is deprived of said contract, said building will be useless and unrentable in its present condition and will have to be again remodeled in order to be of any use or of any rental value. Each of the said five (5) automobiles is built and equipped according to the specifications set out in said contract; each is in first class condition and worth for the completion of said contract substantially its original cost; but because of the peculiar construction and equipment required by the contract, they are of no practical value except for handling the mails and for the execution of said contract; and unless plaintiff is permitted to execute said contract, said automobiles and each one of them will be useless to him and will be practically unsaleable and of a trifling and insignificant market value, solely because equipped for said contract, while they and each one of them is worth its original cost for the execution of said contract.

The defendant proposes to, has threatened to, and will upon the first day of February 1915, unless restrained and enjoined by the Court, announce and promulgate publicly and throughout the Post Office Department of the United States that the said contract is annulled and will, unless restrained and enjoined by the Court, by the unlawful and wrongful exercise of his office as First Assistant Postmaster-General of the United States, obstruct and prevent the plaintiff and the United States of America from the further execution of said contract on the part of either of the parties thereto; will prevent the plaintiff from receiving his compensation under said contract, which now amounts to $1,034.00 per month, and the result of the said abuse of the powers of his office by the defendant will be to deprive the plaintiff in the future of all of the advantages and compensations of said contract.

If the plaintiff and the United States of America are permitted to execute said contract according to its terms, the plaintiff will be able to repay to his creditors the money which, as above stated, he borrowed in order to pay for and acquire the automobiles and garage necessary for the execution of said contract. The said contract and the compensations thereunder have been and are the plaintiff's only resource for meeting the aforesaid obligations; plaintiff states that he has no adequate remedy at law.

In order to show why he has not sooner made this application to the Court, the plaintiff states that after the receipt of the letter hereto attached and marked Ex. "B", he protested, through his Counsel, to the defendant against the annulment of said contract; was advised by the defendant that the matter would be reconsidered and was referred by the defendant to the Purchasing Agent of the Post Office Department; that said Purchasing Agent consid-
5 ered the matter with plaintiff's Counsel and requested him to confer with the Solicitor of said Department, which was

promptly done; said Solicitor directed plaintiff's Counsel to lay the matter before a so-called "Automobile Committee" of the said Department, which was promptly done; the defendant directed the plaintiff's Counsel to confer again with him, the defendant, after addressing said Automobile Committee, which was promptly done; on the 19th day of January A. D. 1915, the defendant requested plaintiff's Counsel to supply him, the defendant, with a brief written statement of the reasons for plaintiff's said protest, which had been advanced before said Purchasing Agent, Solicitor of the Department, and Automobile Committee; said written statement was delivered to the defendant on the 20th day of January 1915, and the plaintiff, through his Counsel, was then advised by the defendant that he, the defendant, would give the question of annulment reconsideration and notify the plaintiff of the result thereof, in consideration whereof the plaintiff, through his Counsel, at the time agreed with the defendant that he would withhold this action until advised by the defendant of the result of the reconsideration aforesaid.

Upon January 27th, 1915, and not before, Defendant notified Plaintiff that he, the Defendant, intended to and would cancel said contract nevertheless.

Wherefore plaintiff prays that a temporary restraining order and temporary injunction issue restraining the defendant, his agents, servants, and subordinates from annulling or attempting to annul the said contract and from interfering or attempting to interfere between the plaintiff and the United States of America in the proper and lawful performance and execution of said contract by the plaintiff according to its terms, until this cause is finally determined; and that on final hearing said injunction may be made perpetual. The plaintiff prays that a rule issue forthwith, requiring the defendant to show cause on or before the — day of January 1915 at 10 o'clock A. M. why the prayers in this bill should not be granted; plaintiff asks that this bill be taken as well as an affidavit upon his application for the injunction aforesaid and prays for all other relief which in the nature of the case is proper and necessary.

JOSEPHUS WELLS.

DAN THEW WRIGHT,
*Attorney for Plaintiff.*

CITY OF WASHINGTON,
*District of Columbia, ss:*

Josephus Wells being first duly sworn says that he is plaintiff in the above entitled cause and that the facts stated in the foregoing Bill of Complaint are true.

JOSEPHUS WELLS.

Sworn to before me and subscribed in my presence by Josephus Wells this 26 day of January A. D. 1915.

[SEAL.] JOHN O. HARMON, JR.,
*Notary Public.*

25¢ paid by affiant.
J. O. HARMON, JR.

6 "EXHIBIT A."

1830.

(In Triplicate.)

*Contract for Automobiles for Use in the City Delivery and Collection Service at Washington, D. C.*

This contract Made this Fourteenth day of February in the year of our Lord one thousand nine hundred and thirteen, by and between the United States of America (by the Postmaster General), of the first part, and Josephus Wells of No. 100 Sixth street southeast, Washington D. C.

Witnesseth, That, whereas, the proposal of the said party of the second part for furnishing to said Department at Washington, D. C., in such numbers, and in such numbers at a time, and from time to time, according to such schedule as may be prescribed by the Postmaster of Washington, D. C., during the period beginning February 12, 1913 and ending February 11, 1917, the equipments and services hereinafter specified, was accepted by the Postmaster General, and contract therefor awarded to said party:

Now, therefore, The said party of the second part hereby covenants and agrees to and with the said party of the first part as follows, to wit:

1. That the said party of the second part shall and will furnish and deliver at his sole risk and expense, in such numbers, and in such numbers at a time, as may be ordered by the Postmaster of Washington, D. C., in accordance with such schedule as he may prescribe, during the period beginning February 12, 1913 and ending February 11, 1917, the following described equipments, at the price herein specified, to wit: Four (4) automobiles with chauffeurs and such additional number of automobiles with chauffeurs to be paid for pro rata as may be required of the said party of the second part during the contract term, for use in the city delivery service of Washington, D. C. Each automobile to have a carrying capacity of not less than 1,500 pounds and be capable of maintaining a speed of 15 miles per hour; the automobiles to be painted a vermilion red shade and lettered with gold leaf with the inscription "United States Mail—Parcel Post." The sides to be provided with eighteen inch panels and a wire screen extending from the tops of the panels to the top of the machine; the back to be provided with a tail gate eighteen inches high and a hinged wire screen extending from the top of the tail gate to the top of the machine, so that the back can be entirely locked with one lock; each machine to be equipped with wind shield and side curtains. Each machine to be used eight hours daily on week days and one machine to be used approximately three hours daily on Sundays in the delivery and in the collection of mail at Washington, D. C., on routes already established, or that may hereafter be established, and to be paid for at the rate of Three thousand one hundred two dollars and fifty cents per annum for each equipment, payments to be made on the first day of each

month, or as soon thereafter as accounts can be adjusted and paid.

7 2. That the automobiles shall be painted in a manner satisfactory to the said postmaster and that they shall be used daily for the service in the foregoing paragraph, in accordance with schedules and routes fixed, or to be fixed, by the said postmaster.

3. That the said party of the second part hereby consents and agrees that any or all of the equipments contracted for herein may be discontinued at any time upon ninety days' notice from the said party of the first part.

4. That the automobiles shall be new at the beginning of the contract term; or, if not new, be rebuilt, when necessary, and repainted, and be substantially as good as new at the beginning of the contract.

5. That the automobiles will be kept in good condition, and in good repair, painted and varnished in a thorough manner, clean and in good condition, and lettered and ornamented, all in a manner to be approved by the said postmaster.

6. That the automobiles will be delivered at such points and at such times as the said postmaster shall from time to time designate.

7. That not less than one extra equipment, to take the place of such as may be temporarily disabled or withdrawn from the service, will be kept on hand without extra compensation therefor, so that the service may be promptly and expeditiously performed.

8. That the full equipment will be submitted to the inspection of the said postmaster at such times and places as he may designate.

9. That the said party of the second part shall be accountable and answerable in damages to the United States, or any person aggrieved, for the careful and faithful conduct of the chauffeurs furnished by the contractor in accordance with this contract.

10. That the Postmaster General may withhold payment for the equipments furnished if it shall appear to his satisfaction that, in any particular, this contract has not been complied with by the said party of the second part.

11. That fines may be imposed by the Postmaster General, unless satisfactory excuse be made within a reasonable time, for each of the following delinquencies on the part of the said party of the second part, to wit:

Failure to deliver the automobiles in accordance with the instructions of the said postmaster;

Failure to keep the equipments in first-class repair and properly painted;

Refusing, after demand, to provide competent drivers or to supply a relief automobile;

Failure to observe the schedule prepared for the delivery of equipments;

Or for any other delinquency or failure properly to perform any of the stipulations of this contract, or for violations of the Postal Laws and Regulations.

The fine in each case to be such sum as the Postmaster General may deem proper in view of the gravity of the delinquency or failure, and to be deducted from the pay due, or to become due,

the party of the second part. And, for repeated failures or delinquencies, or for violations of the Postal Laws and Regulations,
8 the Postmaster General may, at his opinion, annul this contract and award a new contract for supplying such equipments during the remainder of the period contemplated by this contract.

12. That during the period covered by this contract, in the event the party of the second part should, in any respect or particular, fail to furnish the equipments provided for in this contract, current requirements may be supplied by procuring in the open market equipments of the character agreed to be supplied under this contract; and the said party of the second part shall be liable for the excess in cost of each and all such equipments procured in open market over that stipulated in this contract. And in the event of any such failure, in the opinion of the Postmaster General, of any subsequent contractor, with whom a contract may have been entered into on account of any failure of the party of the second part to comply with and carry out any of the provisions of this contract, to fulfill any of the requirements of his contract, the said party of the second part shall be liable in like manner for all excess of cost of equipment secured in open market and under such subsequent contract or contracts, in consequence of such failure, during the whole of the period contemplated by this contract.

13. That neither this contract nor any interest therein shall be transferred or assigned by said party of the second part, and any such transfer or assignment shall cause the annulment of this contract, so far as the United States are concerned; all rights of action, however, for any breach hereof by the party of the second part being reserved to the United States.

14. That, at any time during the continuance of this contract, the Postmaster General may require new or additional sureties upon the bond hereto annexed, if, in his opinion, such sureties are necessary for the proper protection of the interests of the United States; and that the said party of the second part shall furnish such sureties to the satisfaction of the Postmaster General within ten days after notice so to do; and in default thereof this contract may be annulled, at the option of the Postmaster General.

15. That no Member of, or Delegate to, Congress shall be admitted to any share or part of this contract or to any benefit to arise thereupon.

16. That in the performance of this contract no person shall be employed who is undergoing sentence of imprisonment at hard labor which has been imposed by a court of competent jurisdiction.

17. That the annulment of this contract under any stipulation, reservation, or agreement herein contained, or any action taken by or on behalf of the United States in consequence or by reason of such annulment, shall not release or impair its obligation upon said party of the second part and the sureties upon his bond, or defeat or in anywise affect any right, claim, or interest of the United States accruing hereunder; but the liability of the said party of the second part and his said sureties in respect of such right, claim, and interest shall subsist, notwithstanding such annulment and action, and as

fully as if this contract in all respects continued in force and effect.

9 18. That all acts done by the First Assistant Postmaster General in respect of this contract shall be deemed and taken, for all purposes, to be the acts of the Postmaster General, within the meaning and intent of this contract.

In consideration of the furnishing by the said party of the second part of the equipments hereinbefore agreed by it to be supplied, and of his performance of all the other of the foregoing covenants, stipulations, and agreements on his part to be kept or performed, each and all of which are hereby made conditions of this contract—

The United States, party of the first part, covenants and agrees to and with the said Josephus Wells party of the second part, to order of said party the equipments specified and described in this contract which may be required by the Post Office Department at Washington, D. C., during the period from February 12, 1913 to February 11, 1917, and to pay to the said party of the second part for such equipments so supplied, which may have been duly delivered and found upon examination to conform to the contract requirements, at the price hereinbefore specified, such payments to be made after proper examination and adjustment of accounts.

In witness whereof, the said Postmaster General has hereunto affixed his signature and caused the same to be attested by the seal of the Post Office Department on the day and year first above written.

[Seal of P. O. D.]

[SEAL.] F. H. HITCHCOCK,
*Postmaster General.*

Signed, sealed, and delivered in the presence of—
F. D. GARDNER.

*And the said party of the second part has hereunto set his hand

---

* If a partnership, the name of each partner, followed by the firm name, should be signed to the contract, as:

"JAMES L. SMITH,
"HUGH L. SCOTT.
*"Partners, Doing Business as Smith & Scott."*

10 If a corporation, its name should be signed, followed by that of the officer authorized to bind the corporation by contract, as: "THE UNION SUPPLY COMPANY,
"By JAMES L. SMITH, *President."*
"Attest:
HUGH L. SCOTT, *Secretary."*

In addition, a certificate of the secretary should be furnished, showing that the corporation is authorized by its charter to enter into such a contract as is made herein; and that the person who signs such contract for and on behalf of the corporation as an officer thereof is such officer and authorized to bind the corporation by contract. If the corporation have a seal, it must be affixed to the contract; if it have no seal, this should be stated.

and seal on the 6th day of February one thousand nine hundred and thirteen.

The last clause of Article 7 on page 2 of this contract was erased before execution.

JOSEPHUS WELLS. [SEAL.]

Signed in the presence of—
C. E. WEBER.
W. B. HARTLEY.

Approved as to fact:
C. P. GRANFIELD,
*First Assistant Postmaster General.*

Approved as to form:
R. P. GOODWIN,
*Assistant Attorney General for the Post Office Department.*

*Bond.*

Know all men by these presents, That we Josephus Wells of Washington, D. C., in the State of — Principal, and Samuel H. Walker of Washington, D. C., in the State of — and William B. Hardy of Washington, D. C., in the State of — and —— —— of —, in the State of — Sureties, are held and firmly bound unto the United States of America in the just and full sum of Three Thousand dollars, lawful money of the United States, to be paid to the said United States of America or its duly appointed or authorized officer or officers; to the payment of which, well and truly to be made and done, we bind ourselves, our heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this 6th day of February, 1913.

Now, the conditions of this obligation are such, That, if the above-bounden Josephus Wells Samuel H. Walker, and William B. Hardy their heirs, executors, administrators, successors, and assigns, shall well and truly, and in a manner satisfactory to the Postmaster General, furnish the equipments described in the foregoing contract, executed on 6th February, 1913, by the principal herein, for supplying to the Post Office Department at Washington, D. C., during the period beginning February 12, 1913, and ending February 11, 1917, and in all other respects do and perform the covenants, agreements, and stipulations of such contract on their part to be performed, then this obligation to be void and of no effect; otherwise, to remain in full force and virtue.

Signature of principal:

JOSEPHUS WELLS. [SEAL.]

Signatures of sureties:

SAMUEL H. WALKER. [SEAL.]
WILLIAM B. HARDY. [SEAL.]

Signed and sealed in the presence of—
D. D. WALKER.
MARTIN C. WALKER.

11 **Justification of Sureties.*

DISTRICT OF COLUMBIA,
(State or District.)
*County of —, ss:*

Samuel H. Walker and William B. Hardy and —— ——, being each first duly sworn before me the undersigned, a Notary Public in and for said District, depose and say, and each for himself says, that he signed the foregoing obligation as surety; that his residence is therein correctly stated; that he is a freeholder of the District of Columbia and that he is worth the sum here set against his signature, over and above all debts and liabilities, in property in said District, not by law exempt from levy and sale on execution.

SAMUEL H. WALKER. $50,000.
WILLIAM B. HARDY. $6,000.

Subscribed and sworn to before me this 6th day of February A. D., 1913.

GEORGE J. GERGER,
(Signature of Officer.)
*Notary Public.*
(Title.)

*Certificates.*

(These certificates must be signed by a Postmaster, not by an Assistant Postmaster.)

I certify that, to the best of my knowledge and belief, Samuel H. Walker one of the sureties to the foregoing obligation, is worth the sum of $50,000.00 over and above all liabilities, exemptions, and incumbrances whatever.

N. A. MERRITT,
*Postmaster of Washington, D. C.*

Date: Feb. 12, 1913.

I certify that, to the best of my knowledge and belief, William B. Hardy one of the sureties to the foregoing obligation, is worth the sum of $6,000.00 over and above all liabilities, exemptions, and incumbrances whatever.

N. A. MERRITT,
*Postmaster of Washington, D. C.*

Date: Feb. 12, 1913.

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* Personal sureties must jointly justify in a sum equal to twice the penalty of the bond over and above all incumbrances and homestead exemptions, and must be residents of the same State, Territory, or District as the principal.

12 I certify that, to the best of my knowledge and belief, —— —— one of the sureties to the foregoing obligation, is worth the sum of $— over and above all liabilities, exemptions, and incumbrances whatever.

—— ——,
*Postmaster of* —.

Date: —.

(Endorsed:) Post Office Department. Contract for automobiles for use in the city delivery and collection service. P. O. Washington, D. C. Term Feb'y 12, 1913 to Feb'y 11, 1917. Contractor Josephus Wells. Equipment 4 Automobiles, $3,102.50 each per annum.

"Exhibit B."

In Replying Mention Initials and date. D. C. S.

Division of City Delivery,
Post-Office Department,
First Assistant Postmaster General,
Washington.

November 2, 1914.

Mr. Josephus Wells, 100 Sixth Street S. E., Washington, D. C.

Sir: After careful consideration of the matter it has been determined that it is in the interest of the service to conduct in Washington, D. C., an experimental combined screen wagon and city collection and delivery service under the provisions of the Postal Appropriation Act approved March 9, 1914, authorizing the Postmaster General to purchase and maintain wagons or automobiles in the operation of such an experimental service. It is essential to the execution of this purpose that your contract for furnishing four automobiles for use in the delivery and collection service in Washington, D. C., for the period from February 12, 1913 to February 11, 1917, be canceled, and you are hereby notified that under the third stipulation of the contract the use of all of the automobiles furnished thereunder will be discontinued at the close of business January 31, 1915, and the contract canceled effective on that date.

Respectfully,
(Signed) DANIEL C. ROPER,
*First Assistant Postmaster General.*

Sp2.
Registered.

*Stipulation.*

Filed January 29, 1915.

Jan. 29, 1915.

It is understood the use of documents filed in support of the bill at the hearing today is intended to dispense with proof of
13 their contents or authenticity but their legal effect is to remain open so far as both plaintiff and defendant are concerned.

DAN THEW WRIGHT,
*Att'y for Plff.*
JAMES B. ARCHER,
*Attorney for Defendant.*

"Ex. 3" to Bill.

Filed January 29, 1915. J. R. Young, Clerk.

(Copy.)

In replying mention initials and date.

Division of City Delivery,
Post Office Department,
First Assistant Postmaster General,
Washington.

January 27, 1915.

Hon. Daniel Thew Wright, Real Estate Trust Building, Washington, D. C.

Sir: The brief submitted with your letter of January 19, 1915, relative to the cancellation of the contract of Josephus Wells for furnishing four automobiles for use in the delivery and collection service in Washington, D. C., has been considered and after conferring with the Postmaster General in regard to the matter I have to advise you that the Department does not see its way clear to take action other than that indicated in the letter of November 2, 1914, addressed to Mr. Wells, advising him that under the third stipulation of the contract the use of all of the automobiles furnished thereunder will be discontinued at the close of business January 31, 1915, and the contract canceled effective on that date.

Respectfully,

DANIEL C. ROPER,
*First Assistant Postmaster General.*

Sp2.

Equity. No. 33195. Wells vs. Roper.

"Ex. 4" to Bill.

United States Post Office,
Washington, D. C., January 15, 1913.

*Proposal for Furnishing Automobile Trucks.*

The service of four automobiles, properly equipped for the parcel-post delivery and collection service, will be required for eight
14 hours each daily, actual running service, except Sundays, when only one machine will be needed for three hours, actual running service. One relief machine to be on hand at all times, to be used in cases of emergency. Bidder must be prepared to execute a bond in the amount of $3,000.00 for the faithful performance of service and compliance with terms of contract.

The machine to have a carrying capacity of not less than 1,500 pounds, and a speed capacity of at least 15 miles an hour, the drivers or chauffeurs to be furnished by the contractor.

The machines to be new, equipped with substantial bodies painted and varnished a vermillion red shade, and lettered in gold leaf with the inscription "United States Mail". The body to be, in size, approximately as follows: 9′ long, 4′ 10″ high, and 318″ wide at the bottom, inside measurements, at least 5′ 7″ of the length of the body to be exclusive of the seat and available for carrying capacity; the body to be not more than 2′ 2″ from the ground; the sides to be provided with 1′ 6″ panels, and a wire screen extending from the tops of the panels to the top of the machine; the back to be provided with a tail-gate 1′ 6″ high and a hinged wire screen extending from the top of the tail-gate to the top of the machine, so that the back can be entirely locked with one lock; the machines to be constructed with the engine in front, and with a running board on each side 1′ 6″ from the ground; a shield at the front and curtains at the sides; tires of the Motz type perferred.

The machines to be kept clean and in first-class condition at all times during the contract term.

Proposals will be received up to 12 o'clock noon Friday, January 17, 1913, at the Postmaster's Office, Washington, D. C. The right is reserved to reject any or all bids. Proposals to be submitted on the basis of a contract for four years; also the basis of a yearly contract; and also with the understanding that additional machines will be furnished at any time during the term of the contract at a unit proce to be stated.

Delivery to be made within 30 days from the date bidder's proposal is accepted.

Detailed information concerning the service to be performed may be obtained upon application to the postmaster.

(Signed) N. A. Merritt, *Postmaster.*

EX. 5 TO BILL.

*Proposal for Furnishing Motor Vehicles for Use in the Parcel-post Delivery and Collection of Mail.*

The Postmaster:

The undersigned, Josephus Wells, whose post office address is 100 6th St., S. E., Washington, D. C., proposes to furnish four (4) motor vehicles for use in the parcel-post delivery and collection of mail in Washington, D. C., under the advertisement issued by the Postmaster, dated January 15, 1913, subject to all the re-
15 quirements and conditions contained therein, and in the specifications prepared by the Postmaster, at the rate of Thirty-one hundred and two 50/100 ($3,102.50) dollars a year for each car, and if this proposal is accepted, I will execute a bond in the amount of $3,000.00 for the faithful performance of service and compliance with terms of contract. This bid is submitted on the basis of a contract for four (4) years. On a basis of a contract for one (1) year, I submit a bid of $3,558.75 *dollars* per car. It is understood that additional cars will be furnished at any time during the term of the contract at $3,102.50 *dollars* per car.

Delivery to be made within thirty (30) days from the date of acceptance of bid.

This proposal is made in my own interest and not as the agent or representative of another person or Company.

(Signed) JOSEPHUS WELLS.

January 17, 1913.

*Order of Injunction.*

Filed January 29, 1915.

* * * * * * *

This day this cause came on to be heard upon the Rule to show cause issued herein on January 27th 1915, and upon the Bill of Complaint, the Answer of the Defendant to said Rule, and the documents stipulated in open Court by the parties to be used and considered in this cause; and the Court having heard the arguments of counsel for the respective parties and being fully advised in the premises, it is this 29th day of January A. D. 1915 by the Court ordered, adjudged and decreed, that the Defendant, Daniel C. Roper, First Assistant Postmaster General of the United States, his agents successors and subordinates be and he and they are hereby restrained and enjoined until the final hearing of this cause and until the further order of the Court in the premises, from cancelling, annulling, discontinuing or interfering with the contract set forth in the Bill of Complaint herein, and from interfering with the carrying out, execution or performance by the United States of America or by Josephus Wells of the said contract, or of any of the terms

thereof, and from attempting so to do, the trial of this cause to be fixed for an early day.

WALTER I. McCOY,
*Justice of the Supreme Court*
*of the District of Columbia.*

*Motion to Dismiss.*

Filed February 10, 1915.

* * * * * * *

Now comes the defendant, by John E. Laskey, United States Attorney for the District of Columbia, and moves the court to dismiss the bill of complaint for the causes following:

First. It is manifest, upon the face of the bill of com-
16 plaint, that the defendant has no individual interest in the controversy or suit, and that the relief sought against him is in his official capacity only, as a representative of the government, which alone is to be effected by any decree herein, wherefore the said suit, as is manifest upon the face of the bill, is essentially and substantially a suit against the United States beyond the jurisdiction of the court.

Second. It is manifest, upon the face of the bill of complaint, that the plaintiff, in substance, seeks a decree for specific performance by the United States of alleged obligations under a contract, whereof the court is without jurisdiction.

Third. It appears by the bill of complaint that the plaintiff has plain, adequate and complete remedies at law, if he have any right.

Fourth. By the true and lawful construction and meaning of the contract sued upon, the defendant, in his official capacity, has the right and power to discontinue the use of the plaintiff's equipment in the manner alleged.

Fifth. By the true and lawful construction and meaning of the contract sued upon, the United States has an option to discontinue the use of the plaintiff's equipment in the manner alleged.

Sixth. For want of indispensable parties defendant.

Seventh. For want of any independent equity.

Eighth. Because any right of the plaintiff alleged is cognizable exclusively at law.

For other causes apparent upon the face of the bill of complaint.

JOHN E. LASKEY,
*United States Attorney, D. C*

Daniel Thew Wright, Esquire, Attorney for Plaintiff.

SIR: Take notice that the foregoing motion is calendared for hearing on Saturday, the 20th day of February, 1915, subject to the action of the court upon the motion for an earlier special day herein.

JOHN E. LASKEY,
*United States Attorney, D. C.*

*Opinion.*

Filed March 31, 1915.

* * * * * * *

This is a motion to dismiss the bill.

The plaintiff on the 6th day of February, 1913, entered into a contract with the United States through the Postmaster General to supply four or more automobiles with chauffeurs as might be required during the contract term of four years for use in the city mail delivery service of Washington, D. C. The bill alleges that the plaintiff has always performed his part of the contract and that the automobiles and services contracted for are still necessary and required by the Post Office Department and will be so required until the termination of the contract period, but that the de-
17 fendant, who is sued as First Assistant Postmaster General, has threatened to and will unlawfully, illegally, and wrongfully interfere between the plaintiff and the United States in carrying out the contract unless restrained and that he has already notified the plaintiff that the contract will be cancelled, the letter from the First Assistant Postmaster General to that effect stating that it is in the interest of the service to conduct in Washington an experimental combined screen wagon and city collection and delivery service under the Postal Appropriation Act approved March 9, 1914, authorizing the Postmaster General to purchase and maintain wagons or automobiles in the operation of such an experimental service, also that it is essential to the execution of these duties that the plaintiff's contract be cancelled and that under the paragraph 3 of the contract the use of all the plaintiff's automobiles will be discontinued and the contract cancelled. Paragraph 18 of the contract provides that all acts done by the First Assistant Postmaster General in respect to the contract shall be deemed and taken for all purposes to be the acts of the Postmaster General within the meaning and intent of the contract.

Paragraph 3 of the contract referred to in the letter of the First Assistant Postmaster General and under which he claims that the Government has the right to terminate the contract is as follows:

3. That the said party of the second part hereby consents and agrees that any and all of the equipments contracted for herein may be discontinued at any time upon 90 days' notice from the said party of the first part."

One of the grounds specified in the motion to dismiss is that this clause in the contract gives to the Government the right to terminate the contract at any time on ninety days' notice. That is not the language of the paragraph and it seems that if the government had intended to have the right to terminate the contract on ninety days' notice the contract would have stated so specifically. The proper interpretation of the paragraph is that the use of all or any of the automobiles may be discontinued according to the volume of

the business to be done by the post office of the kind for which they were to be used. If the contention of the Government is sound it might have given notice of termination the day after the plaintiff equipped himself with the automobiles and an interpretation which would give such power to the plaintiff would certainly be unreasonable. No one would contract with the Government in a matter of this kind on any such basis if clearly understood.

The Act of 1914 does not confer a right to terminate the plaintiff's contract.

Chicago and N. W. R. Co. vs. U. S., 104 U. S., 680.

The plaintiff claims that as the threatened act of cancellation would have no warrant from anything contained in the contract it would be merely the wrongful act of the First Assistant Postmaster General as an individual and therefore that the Court should re-
18 strain the doing of it, citing numerous authorities in support of the proposition that an illegal act is never an official act and therefore never the act of the State; but none of the cases cited apply to the present situation. What they hold is well summed up in Noble vs. Union River Logging Railroad, 147 U. S., 165 at 171 where the court says:

"We have no doubt the principle of these decisions applies to a case wherein it is contended that the act of a head of a department, under any views that could be taken of the facts that were laid before him, was ultra vires, and beyond the scope of his authority. If he has no power at all to do the act complained of, he is as much subject to an injunction as he would be to a mandamus if he refused to do an act which the law plainly required him to do.

But the Postmaster General had complete jurisdiction of the matter and so far as the contract is concerned stands for the United States and is vested with its power. U. S. vs. Barlow, 184 U. S., 123 at 135. The United States can break its contracts just as an individual can and subject to the same liability to respond in damages as in the case of a breach by an individual, (Purcell Envelope Co. vs. Smith, 26 Wash. L. Rep., 515) the only difference being that the Government must be proceeded against in the Court of Claims. All that the plaintiff can maintain is that the defendant had no right to break the contract, and not that he was acting in regard to a subject matter without the authority of any statute giving him jurisdiction of it and certainly not that he was refusing to obey the clear mandate of a statute which required nothing but strict obedience. It may not be possible to make a generalization that would take in every case which has been decided or every set of circumstances that may be presented but so far as concerns the cases cited by plaintiff and in fact all cases that have come to the attention of the Court there has been no interference by courts of equity with the acts of agents of the government by way of injunction unless those acts would constitute torts for which the plaintiff could recover damages at law, the basis of the application for interposition for equitable relief being the inadequacy of the admitted legal remedy;

or unless the act complained of might be said to be in the nature of a tort, for instance where if done it would cloud the plaintiff's title or the case is one which bears some analogy to the last mentioned class; that is to say, where the right of the plaintiff has been fixed by the action of an executive officer and his successor attempts to undo what has been so done. Those cases in which the writ of mandamus is issued involve the failure of a public official to perform a plain duty imposed by law for the benefit of the petitioner in the mandamus proceeding and there being a plain duty the *the* failure to perform it is in the nature of a tort. No case has been cited in which the Court has decided that an official may be enjoined from doing an act which will be merely a breach of a contract nor any in which a writ of mandamus has issued to compel an official to carry out a contract. It may be argued that the facts of the present case make it analogous to those where the defendant is sued
19 for wrongfully inducing a person to break his contract; but here it is really a party to the contract who is acting, if not, then there is no one who could call the plaintiff to account for clear breaches of the contract—the defendant stands for the Government as has already been shown.

The Court of Claims has jurisdiction of suits on contracts and for damages for breaches of contracts but beyond this the Government has not consented to suits against itself and until it does no suit will lie to enjoin a threatened breach of contract. This is the purport of the statement of the Supreme Court in U. S. vs. Eckford, 73 U. S. 484, where it is said:

"Settled rule of law, as universally understood, is that the Judiciary Act does not authorize a suit against the United States in any of the Federal courts. Where a party contracting with the United States is dissatisfied with the course pursued towards him by the officers of the government charged with the fulfilment of the contract, his only remedy, except in the limited class of cases cognizable in the Court of Claims, is by petition to Congress."

See also U. S. vs. McLemore, 145 U. S. 286.

The suit there was one in which the United States was named as a party defendant but as that Court has frequently said, the fact that an officer of the Government is named as a party does not necessitate a decision that the suit is not against the United States. (Stanley vs. Schwalby, 147 U. S. 518.) The real situation will be considered and if the nominal defendant has no personal interest and a decision for the plaintiff will operate in substance against the United States only the United States is then the real defendant and the suit cannot be maintained. There is no doubt that a decree for the plaintiff in the present suit would operate against the United States only nor that it would be in effect a decree for specific performance. If what has been said is sound it follows that even though it were practically certain that the threatened act of the defendant would irreparably damage the plaintiff he cannot have the doing of it enjoined as Congress has not conferred on any court the power to do so.

But if in a case where irreparable damage would follow the doing of an act such as is threatened by the defendant he could be enjoined no such case is made here. The plaintiff alleges that in order to carry out his contract as required by the Government he purchased five automobiles and their equipment built and equipped according to the specifications of the contract which are of no practical value except for use in carrying out the contract but worth what they cost for the execution of the contract; that he equipped a garage and repair shop in which to house, repair and keep in good condition said automobiles; that the garage is in a part of the city where there is no demand for garages and will have to be remodeled if not used as one; that he borrowed a large sum of money to enable him to pay for such equipment and that a large amount of such sum is still unpaid;
that his only means of payment of the loan must be derived
20 from his contract; that he has expended a large sum of money
for insurance premiums, for a bond to the Government, for gasoline, oil, salaries and repainting; that the rental value of the garage and the value of his services for the past two years were respectively $1,200 and $4,000; that he is a young man who has succeeded in establishing a small grocery store and grocery trade in which he has made a modest living for himself and family and finally that if he is prevented from carrying out his contract or if performance of it is interfered with even temporarily he will be rendered insolvent; his business will be destroyed and his prospects in life blasted. By these allegations he seeks to bring his case within the scope of the decision in Watson vs. Sutherland, 72 U. S. 74, the facts in which case were as follows:

"Watson & Co., appellants in the suit, having issued writs of fieri facias on certain judgments which they had recovered in the Circuit Court for the District of Maryland against Wroth & Fullerton, caused them to be levied on the entire stock in trade of a retail dry goods store in Baltimore, in the possession of one Sutherland, the appellee. Sutherland, claiming the exclusive ownership of the property, and insisting that Wroth & Fullerton had no interest whatever in it, filed a bill in equity, to enjoin the further prosecution of these writs of fieri facias, and to prevent, as he alleged, irreparable injury to himself. The grounds on which the bill of Sutherland charged that the injury would be irreparable, and could not be compensated in damages, were these: that he was the bona fide owner of the stock of goods, which were valuable and purchased for the business of the current season, and not all paid for; that his only means of payment were through his sales; that he was a young man, recently engaged on his own account in merchandising, and had succeeded in establishing a profitable trade, and if his store was closed, or goods taken from him, or their sale even long delayed, he would not only be rendered insolvent, but his credit destroyed, his business wholly broken up, and his prospects in life blasted."

The Court says at page 78:

"It is contended that the injunction should have been refused, because there was a complete remedy at law. If the remedy at law is sufficient, equity can not give relief, 'but it is not enough that there

is a remedy at law; it must be plain and adequate, or in other words, as practical and efficient to the ends of justice, and its prompt administration, as the remedy in equity.' How could Sutherland be compensated at law, for the injuries he would suffer, should the grievances of which he complains be consummated?

"If the appellants made the levy, and prosecuted it in good faith, without circumstances of aggravation, in the honest belief that Wroth & Fullerton owned the stock of goods (which they swear to in their answer), and it should turn out, in an action at law instituted by Sutherland for the trespass, that the merchandise belonged exclusively to him, it is well settled that the measure of damages, if the property were not sold, could not extend beyond the injury done to it, or, if sold, to the value of it, when taken, with interest from the time of the taking down to the trial.

"And this is an equal rule, whether the suit is against the
21 marshal or the attaching creditors, if the proceedings are fairly conducted, and there has been no abuse of authority. Any harsher rule would interfere to prevent the assertion of rights honestly entertained, and which should be judicially investigated and settled. 'Legal compensation refers solely to the injury done to the property taken, and not to any collateral or consequential damages, resulting to the owner, by the trespass.' Loss of trade, destruction of credit, and failure of business prospects, are collateral or consequential damages, which it is claimed would result from the trespass, but for which compensation cannot be awarded in a trial at law.

"Commercial ruin to Sutherland might, therefore, be the effect of closing his store and selling his goods, and yet the common law fail to reach the mischief. To prevent a consequence like this, a court of equity steps in, arrests the proceedings in limine; brings the parties before it; hears their allegations and proofs, and decrees, either that the proceedings shall be unrestrained, or else perpetually enjoined. The absence of a plain and adequate remedy at law affords the only test of equity jurisdiction, and the application of this principle to a particular case, must depend altogether upon the character of the case, as disclosed in the pleadings. In the case we are considering, it is very clear that the remedy in equity could alone furnish relief, and that the ends of justice required the injunction to be issued."

Referring to Watson vs. Sutherland the court said in Van Norden vs. Morton, 99 U. S., 378 at 379:

"The case, as it was, is a very close one and its main feature is absent in the one before us."

The present case is obviously very different from Watson vs. Sutherland. What was enjoined there was a trespass and the scant measure of damage there laid down is not the measure here as the authorities clearly demonstrate.

Purcell Env. Co. vs. Smith, 26 Wash. L. Rep. 515 at 517, where the court says:

"It is also alleged in the bill that the complainant provided an expensive plant for the purpose of manufacturing the material mentioned in the contract, and that if it be not permitted to perform the

contract, the result will be a great reduction in the value of the plant, as it will require a large expenditure to fit it for other uses. If the facts exist to make this a proper element of damages in a suit on the contract, there would be no difficulty in establishing in such suit all the facts necessary to show such reduction in value; and if facts do not exist to make it a proper element of damages, it would constitute no ground for an injunction."

Kennedy vs. U. S. 24 Court of Claims, 24 at 122.
Purcell Env. Co. vs. U. S. 47 Court of Claims, 1.

Where the Court of Claims applied the rule of measure of damage laid down by the Supreme Court as quoted, citing U. S. vs. Behan, 110 U. S. 338, 343, and quoting from that case as follows:

"Whatever rule may be adopted in calculating the damages
22 to a contractor when, without his fault, the other party, during its progress, puts an end to the contract before completion, the object is to indemnify him for his losses sustained and his gains prevented by the act-on of the party in fault, viewing these elements with relation to each other. The profits and losses must be determined according to the circumstances of the case and the subject-matter of the contract. The reasonable expenditures already incurred, the unavoidable losses incident to stoppage, the progress attained, the unfinished part, and the probable cost of its completion, the whole contract price, and the estimated pecuniary result, favorable or unfavorable to him, had he been permitted or required to go on and complete his contract, may be taken into consideration. Sickels' Case, 1 C. Cls. R. 214; Speed's case, 2 C. Cls. R. 429; affirmed on appeal, 8 Wall. 77, and 7 C. Cls. R. 93; Wilder's Case, 5 C. Cls. R. 468; Bulkley's case, 7 C. Cls. R. 543; 19 Wall. 37; and 9 C. Cls. R. 81; Parish's Case, 100 U. S. 600; Field's Case, 16 C. Cls. R. 434; Moore & Krone's Case, 17 C. Cls. R. 17; Power's Case, 18 C. Cls. R. 493; Masterson v. Mayor, &-., of Brooklyn, 7 Hill, 61.

"The amount of the claimant's unavoidable expenditures and losses already incurred are set forth in the findings. But we can give him nothing on account of prospective profits, because none have been proved. So, for the same reason, we can deduct nothing from his expenditures on account of prospective losses which he might have incurred had he not been relieved from completing his contract. This leaves his expenditures as the only damages proved to have resulted to him from the defendants' breach of contract, and they are, therefore, the proper measure of damages under all the circumstances of the case."

The Purcell case was so much like the one now under consideration that further discussion of it seems hardly necessary, but it is perfectly clear that the plaintiff can recover not only what he will lose on his plant, including his automobiles, but also the profits which he would make if permitted to carry out the contract as they are the direct and immediate fruits of the contract and not at all remote or speculative. The plaintiff will not have to stand ready to perform

during the remainder of the contract period. He may regard the contract as terminated and sue for his damage.

Purcell Env. Co. vs. U. S., 47 Court of Claims.
Lovell vs. St. Louis Mut. Ins. Co., 111 U. S. 264
U. S. vs. Shoemaker, 7 Wall. 327 at 338

he may abandon his contract.

Williams vs. U. S., 15 Court of Claims, 461.

The defendant cannot arbitrarily determine that the needs of the service do not require the plaintiff's automobiles. (Williams vs. U. S., Supra.)

The business which the plaintiff in Watson vs. Sutherland contended would be ruined was that for the carrying on of which the goods sought to be levied on were purchased and it was the threatened ruin of that business which was relied on as a basis for
23 the interference of the court, not the ruin of another business conducted by the plaintiff, consequently the allegation of the ruin of the grocery business of the plaintiff in this suit does not bring this bill within the decision in the Watson case. See Masterson vs. The Mayor, 7 Hill, (N. Y.) 61.

The plaintiff claims that a suit in the Court of Claims is not a remedy at law which ordinarily means a remedy by an action tried before a jury; but it has been held differently by this court in Purcell Envelope Co., vs. Smith, 26 Wash. L. Rep. 515, so far as cases like the present one are concerned and the contention made there as here that it was not such a remedy because a judgment of the Court of Claims is not collectible as a matter of right was also disposed of adversely to the plaintiff's contention. The contention of the plaintiff would support an argument as follows: equity will enjoin when there is not an adequate remedy at law for the breach of a contract; a suit in the Court of Claims is not a remedy at law, therefore there should be an injunction even though the judgment of that court would be for an amount adequate to compensate for loss. To so hold would bring into a court of equity every contractor with the Government who claims that the Government is wrongfully preventing him from performing his contract.

The bill will be dismissed.

WALTER I. McCOY, *Justice.*

Dated: March 31, 1915.

*Motion to Restore & Continue Injunction Pending Appeal.*

Filed April 5, 1915.

* * * * * * *

Now comes the plaintiff and moves the Court to restore and to continue the injunction herein heretofore issued pending the appeal herein to the Court of Appeals, or so much of said injunction as is

necessary to preserve the "status quo" herein pending an appeal, on the ground

1. That the same is necessary to affording the relief sought by the plaintiff in the event his appeal turns out successful.

2. That if the contractual status set out in the bill is permitted to be destroyed or changed pending appeal, it cannot be restored in event the appeal is successful.

3. It is necessary to the ascertainment of ultimate justice between the parties.

4. For other reasons apparent on the record.

DAN THEW WRIGHT,
*Att'y for Pl'ff.*

24 *Affidavit in Opposition to Reinstatement of Injunction.*

Filed April 5, 1915.

* * * * * * *

DISTRICT OF COLUMBIA, *To wit:*

Albert S. Burleson, being first duly sworn, on oath, says: That he is the Postmaster-General of the United States; that the post-office appropriation Act for the fiscal year ending June 30, 1915, approved March 4, 1914, contains the following appropriation:

"Wagon service, 1915. For regulation screen or other wagon service, $2,600,000.

Provided, that out of this appropriation the Postmaster-General is authorized, in his discretion, to use such amount thereof as may be necessary for the purchase and maintenance of wagons or automobiles for and the operation of an experimental combined screen wagon and city collection and delivery service."

That is to say, an experimental service comprehending the transportation of mail matter between the post-office and its branches; the collection of mail matter from street letter-boxes, and post-office stations; the delivery of letters, parcels and mail matter of all other classes by means of government owned automobiles, operated by employees of the United States, instead of rented automobiles and horse drawn vehicles capable of performing but one of said several classes of service at a time; that the object of said experimental service is to determine the policy and feasibility of installing such combined service throughout the United States wherever practicable; that at the time of the institution of this suit it had been officially considered and determined to inaugurate such experimental service at Washington; that pursuant to such determination all arrangements had been made to put such service into immediate operation; that it was intended that upon the result of such experimental service should depend the policy of the Post-Office Department in connection with the acceptance or rejection of contracts for service by private contractors throughout the large cities of the Middle West, wherein advertisements for postal and mail service are pending; that such ex-

perimental service was not established elsewhere, and has not been practicable at other points, and nine auto vehicles have been purchased for use in such service in Washington City; that by virtue of the temporary injunction the benefit of such experimental service has been interrupted and delayed for the past two months; that so far as pending contracts and advertisements and proposals are concerned, the benefits of such experimental service will be entirely lost if the injunction be reinstated or continued pending appeal; that the administration of the service will be greatly hampered, and the development of the policy of the Department will be delayed and interfered with; that the resulting injury to the postal service comprehends more than the financial loss to the government
25 in that it will interfere with the development of the policy of the entire postal service throughout the United States depending upon such experimental service, and entail great inconvenience to the Post Office Department in the administration of such service with consequent irreparable loss to the United States and the public which cannot be compensated by a money recovery.

A. S. BURLESON.

Subscribed and sworn to before me, this 5th day of April, 1915.

[SEAL.] ABRAHAM B. KEEFER,
*Notary Public, D. C.*

*Entry Overruling Motion to Restore & Continue the Injunction.*

Filed April 5, 1915.

* * * * * * *

This cause coming on to be heard upon the motion of the plaintiff to restore and continue the injunction herein heretofore issued upon an appeal to the Court of Appeals, the Court finds said motion not well taken and hereby overrules the same, to all of which the plaintiff excepts.

WALTER I. McCOY, *Justice.*

Dated: April 5, 1915.

*Decree.*

Filed April 5, 1915.

* * * * * * *

This cause came on for hearing upon the bill of complaint and exhibits and upon the motion of the defendant to dismiss the bill, and was argued by the counsel for the respective parties and submitted to and duly considered by the Court;

Whereupon, it is this 5th day of April, 1915, adjudged, ordered and decreed that the injunction heretofore issued in this cause be,

and the same hereby is dissolved, and the bill of complaint herein dismissed at the plaintiff's cost.

It is further adjudged, ordered and decreed that the defendant have leave to apply, within thirty days, for an inquiry of damages sustained by the wrongful or inequitable suing out of the injunction heretofore issued herein, and for a further decree for such damages, if any, against the plaintiff and his surety.

By the Court:

WALTER I. McCOY, *Justice.*

To all of which the plaintiff excepts and gives notice of appeal and the court fixes the amount of the bond for costs at $100.

WALTER I. McCOY, *Justice.*

26 *Memorandum.*

April 19, 1915.—Bond of plaintiff on appeal for $100 approved and filed.

*Assignments of Error.*

Filed April 19, 1915.

* * * * * * *

Now comes the Plaintiff and makes the following assignments of Error.

1. The Court erred in sustaining the defendant's motion to dismiss the Bill.
2. The Court erred in dismissing the Bill.
3. The Court erred in dissolving the preliminary injunction.
4. The Court erred in refusing the injunction prayed by the Bill.

DANIEL THEW WRIGHT,
T. M. WAMPLER,
*Att'ys for Pl'ff.*

*Designation of Record.*

Filed April 19, 1915.

* * * * * * *

The clerk will please prepare a transcript of Record for appeal, as follows, Transcript of

1. Bill & attached Exhibit.
2. Stipulation & Exhibits Nos. 3, 4, & 5.
3. Order of injunction.
4. Motion of Def't to dismiss bill.
5. Opinion of the Court on motion to dismiss.
6. Motion of Pl'ff to continue injunction pending appeal.

7. Order overruling motion to continue injunction.
8. Decree dismissing Bill.

DANIEL THEW WRIGHT,
T. M. WAMPLER,
*Att'ys for Pl'ff.*

Copy received April 19th, 1915.

JAMES B. ARCHER,
*Att'y for Defendant.*

27 *Additional Designation of Record.*

Filed April 19, 1915.

* * * * * * *

The clerk will include in the transcript of record on appeal herein the following:

1. Affidavit of Albert S. Burleson, in opposition to plaintiff's motion to continue injunction pending appeal.
2. This order.

JOHN E. LASKEY,
*United States Attorney, D. C.*

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
*District of Columbia, ss:*

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 43, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 33195 in Equity, wherein Josephus Wells is Plaintiff and Daniel C. Roper, First Assistant Postmaster General of the United States is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 3rd day of May, 1915.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 2820. Josephus Wells, appellant, vs. Daniel C. Roper, &c. Court of Appeals, District of Columbia. Filed May 8, 1915. Henry W. Hodges, clerk.

28 FRIDAY, October 15th, A. D. 1915.

No. 2820.

JOSEPHUS WELLS, Appellant,

vs.

DANIEL C. ROPER, First Assistant Postmaster General of the United States.

The argument in the above entitled cause was commenced by Mr. Dan Thew Wright, attorney for the appellant, and was continued by Mr. J. B. Archer, attorney for the appellee, and was concluded by Mr. Dan Thew Wright, attorney for the appellant.

29 No. 2820.

JOSEPHUS WELLS, Appellant,

v.

DANIEL C. ROPER, First Assistant Postmaster General of the United States.

*Opinion.*

Mr. Chief Justice Sheppard delivered the opinion of the Court:

The plaintiff, Josephus Wells, filed this bill against Daniel C. Roper as First Assistant Postmaster-General of the United States to obtain an injunction against a threatened breach of contract between plaintiff and the United States for certain post-office equipments.

The bill alleges that about the fourteenth day of February, 1913, both parties entered upon the performance of their contract, according to its terms, and that plaintiff has at all times complied with every duty and obligation on his part to be performed upon said contract and with every demand or requirement requested of him by the United States under such contract and that the United States has at all times, as the same became due under said contract fully paid the plaintiff according to its terms for the equipment and service rendered by the plaintiff; that plaintiff has never been guilty of any failures or delinquencies under said contract and has never violated the Postal Laws or Postal Regulations; that it is not now, and never has been claimed or pretended by the United States of America, or by any person or officer whatsoever that the plaintiff, or any one in his behalf, has at any time or in any respect failed in the performance of any of his duties or obligations under said contract, or that he has been guilty of any delinquency in the performance of any obligation or stipulation of said contract; that equipments and service as specified in said contract are still necessary to and required by the Post-Office Department at Washington

and will be necessary to and required by the said Department up to and including the fourteenth day of February, 1917; that the plaintiff is ready, able, and willing and anxious to carry out and complete the said contract and every duty and obligation and stipulation thereto on his part to be performed according to its terms; that the defendant has no power, right or authority, either as First Assistant Postmaster-General or in any other capacity to cancel said contract or any part thereof. Yet the defendant has threatened to and will, unless restrained by the court, unlawfully, wilfully and wrongfully interfere between the plaintiff and the United States of America in the carrying on and execution of said contract; in order, as he, the defendant, says "to conduct in Washington, D. C., an experimental combined screen wagon and city collection and delivery service." That in pursuance of his unlawful plan and purpose the defendant has, unlawfully and without any power or authority, undertaken to order that said contract be canceled. At the taking effect of the contract the plaintiff was required by the United States to purchase five new automobiles and their equipment for use under said contract, and he did at that time purchase five new automobiles at a cash cost to him of $9,250. The plaintiff was at the same time required, and he did, construct and equip a garage and repair shop in which to house, repair and keep in first-class condition the said automobiles. The cash cost to plaintiff of constructing a building into a garage with the necessary fire proofing and sewerage required by the regulations of the District of Columbia was $2,535; the necessary cash cost to plaintiff for equipping the garage and machine shop, including electric wiring, electric motor, lathe, tools, etc., was $1,120; in addition to which and necessary to the performance of said contract by the plaintiff he has paid out in cash for fire insurance premiums, liability insurance premiums, bond to the Government, for gasoline, lubricating oil, salaries, repainting and revarnishing said automobiles, $12,799; the reasonable rental value for his garage building for the two years last past devoted to said contract is $1,200; the reasonable value for his own time and services for the two years last past devoted to the execution of said contract is $4,000.

In order to enable himself to acquire the equipment necessary for the execution of said contract, the plaintiff borrowed the sum of $11,000 in money; devoting all of it to that purpose and has paid interest, in addition to the expenditures above-named, at the rate of 6 per cent per annum on his said loan, a large amount of which is still owing and unpaid and will become due in February, 1915; his only means of payment must be derived from and through the contract with the United States aforesaid; he is a young man who has succeeded in establishing a small grocery store and grocery trade in which he has made a modest living for himself and his family. If this contract with the United States of America is interfered with by the defendant and he, the plaintiff, and the United States of America prevented from carrying it out and he, the plaintiff, deprived of its advantages, or its performance even temporarily interfered with, he will be rendered insolvent, his credit will be

destroyed, his business will be wholly broken up and his prospects in life blasted.

The aforesaid building, which he constructed into and equipped as a garage, only for the purpose of executing said contract, is first-class for that purpose but utterly unfit for any other purpose; it is situated in the southeast section of Washington City in a locality where there is no use for and no demand for automobile garages; and if plaintiff is deprived of said contract, said building will be useless and unrentable in its present condition and will have to be again remodeled in order to be of any use or of any rental value. Each of the said automobiles is built according to the specifications set out in said contract; each is in first-class condition for the completion of said contract and worth substantially its original cost, but because of the peculiar construction and equipment required by the contract, they are of no practical value except for handling the mails and for the execution of said contract; and unless plaintiff is permitted to execute said contract said automobiles will be useless to him and will be practically unsaleable and of a trifling and insignificant market value, solely because equipped for said contract.

Defendant proposes to, or has threatened, and will, upon the first day of February, 1915, unless restrained and enjoined by the court, announce and promulgate publicly and throughout the Post-Office Department of the United States that the said contract is annulled and will, unless restrained and enjoined by the court, by the unlawful and wrongful exercise of his office as First Assistant Postmaster-General of the United States, obstruct and prevent the plaintiff and the United States of America from the further execution of said contract on the part of either of the parties thereto, and will prevent the plaintiff from receiving his compensation under said contract, which now amounts to $1,034 per month, and the result of the said abuse of the powers of his office by the defendant will be to deprive the plaintiff in the future of all the advantages and compensation of said contract.

If plaintiff and the United States of America are permitted to execute said contract according to its terms, the plaintiff will be able to repay to his creditors the money which, as above stated, he borrowed in order to pay for and acquire the automobiles and garage necessary for the execution of said contract. The said contract and the compensations thereunder have been and are the plaintiff's only resource for meeting the aforesaid obligations, and plaintiff has no adequate remedy at law.

Plaintiff prays an order restraining the defendant, his agents, and subordinates, from annulling or attempting to annul the said contract and from interfering or attempting to interfere between the plaintiff and the United States of America in the proper and lawful execution of said contract by the plaintiff according to its terms, and that on final hearing said injunction may be made perpetual.

Attached as an exhibit to the bill is the contract entered into February 14, 1913, by and between the United States of America, party of the first part, and Josephus Wells, party of the second part.

This contract recites that the proposal of the party of the second

part for furnishing to the said Department at Washington, in such numbers, and in such numbers at a time, and from time to time, according to such schedule as may be prescribed by the postmaster of Washington, D. C., during the period beginning February 12, 1913, and ending February 11, 1917, the equipments and services hereinafter specified, was accepted by the Postmaster-General, and contract therefore awarded to said party.

31 The covenants are that the party of the second part shall and will furnish and deliver at his sole risk and expense, in such numbers, and in such numbers at a time, as may be ordered by the postmaster at Washington, D. C., in accordance with such schedule as he may prescribe, during the period beginning February 12, 1913, and ending February 11, 1917, the following described equipments, at the prices specified, to wit: Four automobiles with chauffeurs and such additional number of automobiles with chauffeurs to be paid for pro rata as may be required of the said party of the second part during the contract term, for use in the city delivery service of Washington, D. C. The contract proceeded to prescribe the capacity of the said automobiles and their rate of speed and the manner in which they shall be constructed, and provides that the United States shall pay at the rate of $3,102.50 per annum for each equipment, payments to be made on the first day of each month.

The third provision of the contract is "that the said party of the second part hereby consents and agrees that any or all of the equipments contracted for herein may be discontinued at any time upon ninety days' notice from the said party of the first part."

The remainder of the contract makes provision for the keeping of the said equipment and its delivery as notified by the postmaster and certain provisions for fines for delinquencies on the part of the party of the second part, and providing that for repeated failures or for violation of the Postal Regulations, the Postmaster-General may, at his option, annul this contract and award a new contract for supplying such equipments during the remainder of the period contemplated by this contract. A further provision is that the annulment of this contract under any stipulation, reservation, or agreement herein contained, or any action taken by or on behalf of the United States in consequence or by reason of such annulment, shall not release or impair its obligation upon said party of the second part and the sureties upon his bond.

The eighteenth provision is that all acts done by the First Assistant Postmaster-General in respect of this contract shall be deemed to be the acts of the Postmaster-General, within the meaning and intent of this contract.

The contract is signed by F. H. Hitchcock, Postmaster-General, and by the plaintiff.

Other exhibits show the bond given by the plaintiff for the performance of the contract and a letter of November 2, 1914, directed to plaintiff and signed by the defendant, as First Assistant Postmaster-General, which recites "after careful consideration of the matter it has been determined that it is in the interest of the service to

conduct in Washington, D. C., an experimental combined screen wagon and city collection and delivery service under the provisions of the Postal Appropriation Act, approved March 9, 1914, authorizing the Postmaster-General to purchase and maintain wagons or automobiles in the operation of such an experimental service. It is essential to the execution of this purpose that your contract for furnishing four automobiles for use in the delivery and collection service in Washington, D. C., for the period from February 12, 1913, to February 11, 1917, be canceled, and you are hereby notified that under the third stipulation of the contract the use of all of the automobiles furnished thereunder will be discontinued at the close of business January 31, 1915, and the contract canceled effective on that date."

Plaintiff protested against this notice of cancellation and, through his counsel, had correspondence with defendant.

Another letter attached as an exhibit, January 25, 1915, directed to counsel for plaintiff, and signed by Daniel C. Roper as First Assistant Postmaster-General recites the receipt of his letter relative to the cancellation of the contract, and, after conferring with the Postmaster-General, in regard to the matter states "I have to advise you that the Department does not see its way clear to take action other than that indicated in the letter of November 2, 1914, addressed to Mr. Wells, advising him that under the third stipulation of the contract the use of all of the automobiles furnished thereunder will be discontinued at the close of business January 31, 1915, and the contract canceled effective on that date."

Rule to show cause was issued and a temporary injunction awarded January 29, 1915.

The Appropriation Act of March 4, 1914, contained an appropriation for regulation screen or other wagon service, and provided that out of this appropriation the Postmaster-General is authorized, in his discretion, to use such amount thereof as may be necessary for the purchase and maintenance of wagons or automobiles for, and the operation of, an experimental combined screen wagon and city collection and delivery service.

This is set up by an affidavit of the Postmaster-General in opposition to the injunction, who further says, that this experimental service comprehended the transportation of mail matter between the post-office and its branches; the collection of mail matter from the street letter boxes, and post-office stations; the delivery of letters, parcels and mail matter of all other classes by means of Government owned automobiles, operated by employees of the United States, instead of rented automobiles and horse-drawn vehicles capable of performing but one of said several classes of service at a time; that the object of said experimental service is to determine the policy and feasibility of installing such combined service throughout the United States wherever practicable; that at the time of the institution of this suit it had been officially considered and determined to inaugurate such experimental service at Washington; that pursuant to such determination all arrangements had been made to put such service into immediate operation; that it was intended that upon the

result of such experimental service should depend the policy of the Post-Office Department in connection with the acceptance or rejection of contracts for service by private contractors throughout the large cities of the middle west, wherein advertisements for postal and mail service are pending; that such experimental service was not established elsewhere, and has not been practicable at other points, and nine automobiles have been purchased for use in such service in Washington City; that by virtue of the temporary injunc-
32 tion the benefit of such experimental service has been interrupted and delayed for the past two months; that so far as pending contracts and advertisements and proposals are concerned, the benefits of such experimental service will be entirely lost if the injunction be reinstated or continued pending appeal; that the administration of the service will be greatly hampered, and the development of the policy of the Department will be delayed and interfered with; that the resulting injury to the postal service comprehends more than the financial loss to the Government in that it will interfere with the development of the policy of the entire postal service throughout the United States depending upon such experimental service, and entail great inconvenience to the Post-Office Department in the administration of such service with consequent irreparable loss to the United States and the public which can not be compensated by a money recovery.

February 10, 1915, the defendant moved to dismiss on the ground that the defendant had no individual interest in the controversy, and that the relief sought against him is in his official capacity only, as a representative of the Government, which alone is to be affected by any decree herein; wherefore the said suit as manifest upon the face of the bill is essentially and substantially a suit against the United States beyond the jurisdiction of the court.

Second, it is manifest, upon the face of the bill of complaint, that the plaintiff seeks a decree for specific performance by the United States of alleged obligations under a contract, whereof the court is without jurisdiction.

It appears by the bill of complaint that the plaintiff has plain, adequate and complete remedies at law, if he have any right.

Fourth, by the true and lawful construction and meaning of the contract sued upon, the defendant, in his official capacity, has the right and power to discontinue the use of the plaintiff's equipment in the manner alleged.

That by the true construction of the said contract the United States has an option to discontinue the use of the plaintiff's equipment in the manner alleged.

This motion was heard, and on March 31, 1915, was sustained and the bill dismissed.

It will be observed that the third article of the contract provides that any and all of the equipments contracted for may be discontinued upon ninety days' notice which was given by the First Assistant Postmaster-General, whose acts, by section 18, in respect to this contract, shall be taken to be the acts of the Postmaster-General.

The letter of the Assistant Postmaster-General of November 14,

1914, notified the plaintiff that the use of his equipments would be discontinued on January 31, 1915, and that his contract would be canceled, effective on that date.

Reconsideration of this was refused and the former notice adhered to.

The Assistant Postmaster-General had the right to discontinue the use of the equipments by giving ninety days' notice. All that the plaintiff was to furnish under the contract was these equipments; this was what he was paid for.

The court have not agreed that under the contract the stoppage of these equipments, under clause three (3), of the contract, was essentially the termination of plaintiff's service, and consequently of his contract.

In the opinion of the writer this was necessarily so, and that notice that the contract would be canceled added nothing to this effect.

However this may be, any suit for breach of a contract or for its specific performance would be a suit against the United States. Their interests only are involved. Congress had appropriated the money and authorized the Postmaster-General to inaugurate the special service provided for in the Appropriation Act of 1914, and he had made preparations for the new service in lieu of plaintiff's. The bill for injunction against him to prevent putting into effect the new service would act as a negative specific performance by preventing the Postmaster-General from substituting the new service, and would affect only the interests of the United States. No action for specific performance would lie against the United States.

The form of the suit for injunction is a negative specific performance which would compel the United States to accept the performance of a contract and thereby affect their interest.

The First Assistant Postmaster-General is sued officially, as such, and his restraint from terminating the contract is the restraint of the United States, whose official he is.

Notwithstanding the serious character of the injuries that would be inflicted upon plaintiff by cessation of the contract, the only remedy that he will have therefor is in the Court of Claims where alone the United States permit themselves to be sued.

The case is wholly unlike that of Noble v. Union River Logging Railroad, 147 U. S., 165.

In that case a property right had become vested in the plaintiff by the action of the Secretary of the Interior in accordance with law. As decided, this was a vested right which no succeeding secretary had the right to set aside. It was his personal act and involved an invasion of right over which he had no jurisdiction.

The defendant is not interfering in this contract in his individual capacity, but solely as an officer of the United States; he has no personal interest in the matter.

It appearing that Congress had made an appropriation for experimental service in Washington which might conflict with that in plaintiff's contract, the First Assistant Postmaster-General notified him of the discontinuance of his equipment. This he had a right to do under the contract. It was within his discretion.

The fact that he accompanied it also with notice that the contract would be canceled is immaterial, for the reason that the discontinuance of the equipment, which was the sole service to be performed by the plaintiff, was itself a termination of the contract.

If, however, he exceeded his power in the latter respect the question is one in which the United States only are interested and if plaintiff has been aggrieved he would have such remedy as the law provides by an action in the Court of Claims, where alone the United States can be sued.

The court was right in dismissing the bill and its decree is affirmed with costs. Affirmed.

33 January Term, 1916.

MONDAY, January 3rd, A. D. 1916.

No. 2820.

JOSEPHUS WELLS, Appellant,

vs.

DANIEL C. ROPER, First Assistant Postmaster General of the United States.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the decree of the said Supreme Court in this cause be, and the same is hereby, affirmed with costs.

PER MR. CHIEF JUSTICE SHEPARD.

January 3, 1916.

34 In the Court of Appeals of the District of Columbia, October Term, 1915.

No. 2820.

JOSEPHUS WELLS, Appellant,

vs.

DANIEL C. ROPER, Appellee.

*Petition for Appeal.*

Now comes the said Josephus Wells and says that in the rendition of the judgment of the Court here, affirming the judgment of the Supreme Court of the District of Columbia herein, error has inter-

vened to his prejudice, as well as in the rendition of the said judgment in the Supreme Court of the District of Columbia.

Wherefore he prays an appeal in this behalf to the Supreme Court of the United States for the correction of the errors aforesaid, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States in accordance with law.

The petitioner shows to your Honors:

1. That in this case the validity of an authority exercised under the United States is drawn in question.

3. The scope of a power of an officer of the United States is drawn in question.

3. The scope of a power of an officer of the United States is drawn in question.

4. The construction of a law of the United States is drawn in question by the defendant.

JOSEPHUS WELLS,

By DANIEL THEW WRIGHT AND
T. MORRIS WAMPLER,
*Attorneys.*

35 In the Court of Appeals of the District of Columbia, October Term, 1915.

No. 2820.

JOSEPHUS WELLS, Appellant,

vs.

DANIEL C. ROPER, Appellee.

*Assignment of Errors.*

Now comes the said Josephus Wells and makes the following assignment of errors in the above entitled cause:

The said Court of Appeals erred:

1. In affirming the judgment of the Court below.
2. In decising that the Motion to Dismiss the Bill was well taken.
3. In deciding that the Bill should be dismissed.
4. In deciding that the defendant D. C. Roper had authority to cancel the contract described in the Bill.
5. In deciding that the defendant D. C. Roper had power of authority to discontinue the use of the equipment provided for in the contract set out in the Bill.
6. The said Court erred in construing the contract set out in the Bill as empowering the defendant to cancel the same.
7. The said Court erred in construing the contract set out in the Bill as empowering the defendant to dispense with the automobiles and equipment provided for in said contract.

8. The said Court erred in considering an affidavit of Albert S. Burleson, upon the Motion to Dismiss the Bill.

DANIEL THEW WRIGHT,
T. MORRIS WAMPLER,
*Attorneys for Appellant.*

(Endorsed:) No. 2820. Josephus Wells, Appellant, vs. Daniel C. Roper, Appellee. Petition for Appeal. Assignment of Errors. Court of Appeals, District of Columbia. Filed Feb. 1, 1916. Henry W. Hodges, Clerk.

36 SATURDAY, February 5th, A. D. 1916.

No. 2820.

JOSEPHUS WELLS, Appellant,

vs.

DANIEL C. ROPER, First Assistant Postmaster General of the United States.

On consideration of the petition for the allowance of an appeal to the Supreme Court of the United States in the above entitled cause, It is by the Court this day ordered that said appeal be, and the same is hereby, allowed, and the bond for costs is fixed at the sum of three hundred dollars.

37 (*Bond on Appeal.*)

Know all men by these presents, That we, Josephus Wells, as principal, and Christine E. Weber, as surety, are held and firmly bound unto Daniel C. Roper in the full and just sum of Three Hundred dollars, to be paid to the said Daniel C. Roper — certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 7th day of February, in the year of our Lord one thousand nine hundred and sixteen.

Whereas, lately at a Court of Appeals of the District of Columbia in a suit depending in said Court, between Josephus Wells and Daniel C. Roper a decree was rendered against the said Josephus Wells and the said Josephus Wells having prayed and obtained an appeal to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said Daniel C. Roper citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof;

Now, the condition of the above obligation is such, That if the said Josephus Wells shall prosecute said appeal to effect, and answer

all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

JOSEPHUS WELLS. [SEAL.]
CHRISTINE E. WEBER. [SEAL.]

Sealed and delivered in presence of—as to both:

JAMES B. ARCHER.

Surety satisfactory,

JAMES B. ARCHER,
*Ass't U. S. Att'y D. C.*

Approved by—

SETH SHEPARD,
*Chief Justice Court of Appeals*
*of the District of Columbia.*

37½ [Endorsed:] 2820. Josephus Wells, Appellant, vs. Daniel C. Roper, First Assistant Postmaster General of the United States. Bond on Appeal to Supreme Court United States. Court of Appeals, District of Columbia. Filed Feb. 8, 1916. Henry W. Hodges, Clerk.

38 UNITED STATES OF AMERICA, *ss:*

To Daniel C. Roper, First Assistant Postmaster General of the United States, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal, filed in the Clerk's office of the Court of Appeals of the District of Columbia, wherein Josephus Wells is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Seth Shepard, Chief Justice of the Court of Appeals of the District of Columbia, this 8th day of February, in the year of our Lord one thousand nine hundred and sixteen.

SETH SHEPARD,
*Chief Justice of the Court of Appeals*
*of the District of Columbia.*

Service acknowledged this 8th day of February, 1916.

JOHN E. LASKEY,
*Counsel for Appellee.*

[Endorsed:] Court of Appeals, District of Columbia. Filed Feb. 8, 1916. Henry W. Hodges, Clerk.

39 Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 38 inclusive constitute a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Josephus Wells, Appellant, vs. Daniel C. Roper, First Assistant Postmaster General of the United States, No. 2820, January Term, 1916, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 12th day of February, A. D. 1916.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
*Clerk of the Court of Appeals*
*of the District of Columbia,*

By MONCURE BURKE,
*Assistant Clerk.*

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled Feb. 17, 1916. H. W. H.]

Endorsed on cover: File No. 25,140. District of Columbia Court of Appeals. Term No. 103. Josephus Wells, appellant, vs. Daniel C. Roper, First Assistant Postmaster General of the United States. Filed February 18th, 1916. File No. 25,140.

Office Supreme Court, U. S.
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# IN THE
# Supreme Court of the United States

JOSEPHUS WELLS, *Appellant*,
*vs.*
DANIEL C. ROPER, *Appellee.*

October Term, 1917
No. 103.

## BRIEF FOR APPELLANT

DANIEL THEW WRIGHT,
T. MORRIS WAMPLER,
*Counsel for Appellant.*

National Publishing Company, Printers

## INDEX.


| | Pages |
|---|---|
| Statement of the case | 1 |
| Did the defendant have the right to cancel the contract? | 8 |
| Was the suit against the United States? | 26 |
| An illegal act is never an "official act," and never the act of the state, it is always the individual tort of the perpetrator, and injunction or mandamus will control him | 31 |
| Had complainant an adequate remedy at law? | 37 |


---

## TABLE OF CASES CITED.


| | Pages |
|---|---|
| Belknap v. Schild, 161 U. S. 10 | 35 |
| Boyce's Exors. v. Grundy, 3 Peters, 210 | 46 |
| Board of Liquidation v. McComb, 92 U. S. 531 | 32 |
| Carr v. U. S., 98 U. S. 433 | 35 |
| Chicago & N. W. Ry. Co. v. U. S., 104 U. S. 680 | 7, 8 |
| Cavenaugh Sons Co. v. Jackson, etc., 186 Pa. St. 443 | 49 |
| Edsell v. Briggs, 20 Mich. 429 | 49 |
| Ex Parte Young, 209 U. S. 123 | 36 |
| Garfield v. U. S., 211 U. S. 250 | 34 |
| Hartman v. Greenhow, 102 U. S. 672 | 34 |
| Hipp v. Bobin, 60 U. S. 279 | 42 |
| Kendall v. U. S., 12 Peters 524 | 34 |
| Louisiana v. Garfield, 211 U. S. 70 | 35 |
| McElreth v. U. S., 102 U. S. 440 | 41 |
| McConnaughy v. Pennoyer, 43 Fed. 196 | 31 |

Mutual Life Ins. Co. v. Pearson, 114 Fed. 395----- 49
Noble v. Logging Co., 147 U. S. 171-2----------- 33
Noonan v. Bradley, 76 U. S. 394-407----------- 13
Oregon v. Hitchcock, 202 U. S. 56----------- 35
Osborn v. Bank of U. S., 9 Wheat. 738---------- 34
Parsons v. Bedford, 3 Peters 433---------- 42
Peck v. Ayers, 116 Fed. 274---------- 43
Poindexter v. Greenhow, 114 U. S. 288---------- 29
Postal Supply Co. v. Bruce, 194 U. S. 601------- 35
School of Magnetics v. McAnnaulty, 187 U. S. 94-- 34
Scranton v. Wheeler, 179 U. S. 141---------- 34
Springfield Milling Co. v. Barnard, etc., 81 Fed. 261 ---------- 49
Stanley v. Schwalby, 147 U. S. 518---------- 33
Tanner v. Little, 240 U. S. 369---------- 36
Thomas v. Taggart, 209 U. S. 385---------- 11
Thomas v. Council Bluffs, etc., 92 Fed. 424------- 42
Trust Co. v. Shoenfelt, 153 Fed. 484---------- 42
Truax v. Raich, 239 U. S. 33---------- 35
U. S. v. Lee, 106 U. S. 196---------- 34
U. S. v. Douglas, 77 U. S. 15---------- 34
U. S. ex rel. Levey v. Stockslager, 129 U. S. 470 --- 35
U. S. Stage Co., 199 U. S. 423---------- 40
U. S. v. Utah N. & C. Stage Co., 199 U. S. 423---- 10,11
Walla Walla v. Water Works, 172 U. S. 12------- 46
Wardsworth v. Boysen, 148 Fed. 771---------- 31
Watson v. Sutherland, 72 U. S. 74---------- 48
Wells v. Nichols, 104 U. S. 444---------- 34
Judicial Code, Sec. 143---------- 40
Judicial Code, Sec. 267---------- 43

IN THE

# Supreme Court of the United States

JOSEPHUS WELLS, *Appellant*,
*vs.*
DANIEL C. ROPER, *Appellee*.

October Term, 1917
No. 103.

## BRIEF FOR APPELLANT.

The case is here on appeal from a judgment of the Court of Appeals of the District of Columbia, which affirmed a judgment of the Supreme Court of the District of Columbia, dismissing the bill of the Appellant Wells, upon a Motion to Dismiss, which, under the rules of that Court, serves the function of a Demurrer.

## STATEMENT OF THE CASE.

On January 15, 1913, the Post Office Department of the United States advertised for bids for the services of four automobiles equipped for the parcel post delivery and collection service, together with one relief machine to be on hand at all times, the machines to be new and of an especial type not fit for any other service, the chauffeurs to be furnished by the contractor, "proposals to be submitted upon the basis of a contract for four years;" on January 17, 1913, the Appellant Wells submitted a bid which was accepted and a written contract was signed on February 14, 1913.

The Bill averred. (R. p. 3.)

"At the taking effect of the contract, the plaintiff was required by the United States of America to purchase five (5) new automobiles and their equipment for use under said contract, and he did at that time purchase five (5) new automobiles at a cash cost to him of $9,250. In order to carry out said contract to the satisfaction of the United States of America, the plaintiff was at the same time required and he did, construct and equip a garage and repair shop in which to house, repair and keep in first-class condition the said five (5) automobiles. The cash cost to the plaintiff of constructing a building into a garage with the necessary fire-proofing and sewerage required by the regulations of the District of Columbia was $2,535; the necessary cash cost to the plaintiff for equipping the garage and machine shop, including electric wiring, electric motor, lathe, tools, air pump, shafting and pulleys, emery wheel, forge, oil tank, fire extinguishers, and electric light contract, was $1,120; in addition to which and necessary to the performance of said contract by the plaintiff he has paid out in cash for fire insurance premiums, liability insurance premiums, bond to the Government, for gasoline, lubricating oil, salaries, repainting and revarnishing said five (5) automobiles, $12,799; the reasonable rental value of his garage building for the two years last past devoted to said contract is $1,200; the reasonable value of his own time and services for the two years last past devoted to the execution of said contracts is $4,000.

"In order to enable himself to acquire the equipment necessary for the execution of said contract,

the plaintiff borrowed the sum of $11,000 in money; devoting all of it to that purpose, and has paid interest, in addition to the expenditures above named, at the rate of 6% per annum on his said loan, a large amount of which is still owing and unpaid and will become due in February, 1915; his only means of payment must be derived from and are through the contract with the United States of America aforesaid; that he is a young man, who has succeeded in establishing a small grocery store and grocery trade in which he had made a modest living for himself and his family. If this said contract with the United States of America is interfered with by the defendant and he, the plaintiff, and the United States of America prevented from carrying it out and he, the plaintiff, deprived of its advantages, or its performance even temporarily interfered with, he will be rendered insolvent, his credit will be destroyed, his business will be wholly broken up and his prospects in life blasted

"The aforesaid building, which he constructed into, and equipped as, a garage only for the purpose of executing said contract, is first-class for that purpose, but utterly unfit for any other purpose; it is situated in the South East section of Washington City in a locality where there is no use for and no demand for automobile garages; and if plaintiff is deprived of said contract, said building will be useless and unrentable in its present condition, and will have to be again remodeled in order to be of any use or of any rental value. Each of the said five (5) automobiles is built and equipped according to the specifications set out in said contract; each is in first-class con-

dition and worth for the completion of said contract substantially its original cost; but because of the peculiar construction and equipment required by the contract, they are of no practical value, except for handling the mails and for the execution of said contract; and unless plaintiff is permitted to execute said contract, said automobiles and each one of them will be useless to him, and will be practically unsalable and of a trifling and insignificant market value, solely because equipped for said contract, while they and each one of them is worth its original cost for the execution of said contract.

"For the period of about two years the contract was carried out by both parties to their mutual satisfaction. The United States has at all times as the same became due under said contract fully paid the plaintiff, according to the terms of said contract, for the equipment and services rendered by the plaintiff under said contract.

"The plaintiff has never been guilty of any failures or delinquencies under said contract; the plaintiff has never violated the postal laws or the postal regulations.

"It is not now, and never has been claimed or pretended by the United States of America or by any person or officer whatsoever that the plaintiff, or any one in his behalf, has at any time or in any respect failed in the performance of any of his duties or obligations under said contract.

"It is not now, and never has been claimed or pretended by the United States of America, or by any person or officer whatsoever that the plaintiff, or any one in his behalf, has been guilty of

any delinquency in the performance of any obligation or stipulation of said contract.

"It is not now, and never has been claimed or pretended by the United States of America or by any person or officer whatsoever that the plaintiff, or any one in his behalf, has violated the postal laws or the postal regulations.

"It is not now, and never has been claimed or pretended by the defendant that the plaintiff, or any one in his behalf, has been guilty of failures or delinquencies, or that plaintiff, or any one in his behalf has violated the postal laws or postal regulations. Equipments and service as specified and described in said contract are still necessary to and required by the Post Office Department at Washington, D. C., and will be necessary to and required by the said Department at said place all the time up to and including the 14th day of February, 1917. The form and phraseology of said contract was prepared by the United States of America.

"The plaintiff is ready, able, willing and anxious to carry out and complete the said contract and every duty and obligation and stipulation thereto on his part to be performed, according to the terms of the said contract.

"The defendant has no power, right or authority, either as First Assistant Postmaster General or in any other capacity, to cancel said contract or any part thereof. Yet the defendant has threatened to and will, unless restrained by the Court, unlawfully, willfully and wrongfully interfere between the plaintiff and the United States of America in the carrying on and execution of said contract; in order, as he, the defendant, says 'to

conduct in Washington, D. C., an experimental combined screen wagon and city collection and delivery service.'

"The defendant proposes to, has threatened to, and will upon the first day of February, 1915, unless restrained and enjoined by the Court, announce and promulgate publicly and throughout the Post Office Department of the United States that the said contract is annulled and will, unless restrained and enjoined by the Court, by the unlawful and wrongful exercise of his office as First Assistant Postmaster General of the United States, obstruct and prevent the plaintiff and the United States of America from the further execution of said contract on the part of either of the parties thereto; will prevent the plaintiff from receiving his compensation under said contract, which now amounts to $1,034.00 per month, and the result of the said abuse of the powers of his office by the defendant will be to deprive the plaintiff in the future of all of the advantages and compensations of said contract.

"If the plaintiff and the United States of America are permitted to execute said contract according to its terms, the plaintiff will be able to repay to his creditors the money which, as above stated, he borrowed in order to pay for and acquire the automobiles and garage necessary for the execution of said contract. The said contract and the compensations thereunder have been and are the plaintiff's only resource for meeting the aforesaid obligations; plaintiff states that he has no adequate remedy at law."

The first notice which Wells had that the defendant

intended to interfere with the execution of the contract was by letter of date November 2, 1914, which advised him (Wells) that the contract would be canceled on January 31, 1915; he immediately (R. p. 4) requested a hearing and reconsideration, the matter was retained under advisement by the defendant until January 27, 1915, upon which day (R. p. 13) the determination to override the contract on January 31st was reaffirmed; the Bill was filed and a temporary injunction secured on January 27th, *while the contract was still in process of execution, while still being adhered to and carried out by both parties, and before there had been any actual interruption of it or interference with its execution by the defendant or any one else.* The defendant filed a Motion to Dismiss the Bill (R. p. 16); such a motion under Equity Rule 32, Supreme Court, D. C., serves the functions of a Demurrer. The lower Court (R. p. 17-18) held (following Chicago & N. W. Railway Co. v. United States, 104 U. S., 680), that the defendant had no right nor power to terminate the contract, but found itself of the opinion that the suit was one against the United States and that upon the face of the Bill the plaintiff had an adequate remedy at law, and for these reasons sustained the motion and dismissed the Bill; this ruling was affirmed by the Court of Appeals, and from that judgment of the Court of Appeals the case is now here.

While the trial court decided that the ~~said~~ defendant had no power or authority to cancel the contract, the Court of Appeals ruled otherwise, and that he did have the power to cancel as a matter of right: (R. p. 34) thus three questions are presented:

1. Did the defendant have the right to cancel the contract?

2. Was the suit one in effect against the United States?

3. Does the Bill show that the plaintiff had an adequate remedy at law?

These questions will be examined in their order.

## DID THE DEFENDANT HAVE THE RIGHT TO CANCEL THE CONTRACT?

Of course there is not any law constituting the First Assistant Postmaster General official contract-breaker for the United States, nor empowering him to run amuck and break up this, that or the other of the Government's existing contracts; if his office possesses any power of annulment, it can only be because that power is reserved in the contract itself.

In Chicago and Northwestern Ry. Co. v. United States, 104 U. S., the Court, on page 685, said:

> "The contracts of 1875 were for four years, and were expressly authorized by law. They were, therefore, valid and binding on the United States as well as upon the railroad company. They contain, within themselves, a mode for lessening, or if deemed best, for discontinuing entirely the described service; and provided for a proportionate reduction of the stipulated compensation. *In no other mode could the contracts be changed except by the mutual assent of the parties.*"

As to the official power of the defendant, it is conceded by appellant that the office of First Assistant Postmaster General, temporarily filled by Mr. Roper, had the right to exercise on behalf of the United States any power which the contract reserved. It is claimed by

the appellant, and is plain enough from the contract, that, as stated in the Bill, none of the causes for annulment reserved in the contract ever existed; therefore, no right to annul ever existed.

The contract upon its face specified in detail the causes for annulment (Par. 11, R. p. 7, 8) in these words:

> "And, for repeated failures or delinquencies or for violations of the postal laws or the regulations, the Postmaster General may, at his option, annul this contract and award a contract for supplying such equipment during the remainder of the period contemplated by this contract."

And in Paragraph 14:

> " * * * at any time during the continuance of this contract, the Postmaster General may require new or additional sureties upon the bond, * * * and in default thereof, this contract may be annulled, at the option of the Postmaster General."

The bill averred and the motion admitted that there never was any cause for annulment.

In spite of the enumeration on the face of the contract of specific *causes* for annulment, the Court of Appeals decided that another clause of the contract which empowered the Postmaster General to *"discontinue equipment,"* empowered the Postmaster General to annul the contract in its entirety *without* any cause. This was Paragraph 3. Torn from its context, dismembered and dissevered from a writing of which it is a part, and of which the other parts cannot be reconciled with such

a meaning, it might perhaps be tortured into the significance given by the Court of Appeals; but this meaning so conflicts with the sense, purpose and significance of all the other parts of the contract as to render empty and forceless every other provision which the contract contains; because with every other provision the meaning accorded to Paragraph 3 by the Court of Appeals is quite irreconcilable and utterly at war. The contract must, therefore, be examined with a view to the interpretation of Paragraph 3, which is as follows:

> "That the said Party of the Second Part hereby consents and agrees that any or all of the equipment contracted for herein may be discontinued at any time upon ninety days' notice of the said Party of the First Part."

In the examination of this contract with a view to coming at the intention of the parties, certain rules which have heretofore been established by the Supreme Court are to be availed of.

> "The same principles of right and justice which prevail between individuals should control in the construction and carrying out of contracts between the Government and individuals."
>
> U. S. v. Utah N. & C. Stage Co., 199 U. S. 423.

> "In giving a proper construction, the Court is required to examine the entire contract to consider the relation of the parties, and the circumstances under which it was signed."
>
> U. S. v. Utah N. & C. Stage Co., 199 U S 423.

> "The elementary canon of interpretation is not

> that particular words may be isolatedly considered, but that the whole contract must be brought into view, and interpreted with reference to the nature of the obligations between the parties, and the intention which they have manifested in forming them."
>
> U. S. v. Utah N. & C. Stage Co., 199 U. S. 423.

> "We should look carefully to the substance of the original agreement, as contradistinguished from its mere form, in order that we may give it a fair and just construction, and ascertain the substantial intent of the parties, which is the fundamental rule in the construction of all agreements."
>
> U. S. v. Utah N. & C. Stage Co., 199 U. S. 423.

In the above cited case the Court considered and gave controlling effect to the statements contained in the Government's advertisement for proposals for bids

Says the Court in another case:

> "The *written* provisions of a contract will, in case of any repugnancy, prevail over its *printed* provisions."
>
> Thomas vs. Taggart, 209 U. S. 385.

The contract at bar was upon a printed form, paragraph 3 of the contract is entirely in print; while in the quotation now taken from the contract, the italicized words are in either *manuscript* or *typewriting;* the unitalicized is in print.

"That the said party of the second part shall and will furnish and deliver at *his* sole risk and expense, in such numbers, and in such numbers at a time, as may be ordered by the Postmaster of *Washington, D. C.*, in accordance with such schedule as he may prescribe, during the period beginning *February 12, 1913*, and ending *February 11, 1917*, the following described equipments, at the price herein specified, to wit: *Four (4) automobiles with chauffeurs and such additional number of automobiles with chauffeurs to be paid for pro rata as may be required of the said party of the second part during the contract term, for use in the city delivery service of Washington, D. C. Each automobile to have a carrying capacity of not less than 1,500 pounds and be capable of maintaining a speed of 15 miles per hour; the automobiles to be painted in vermillion red shade and lettered with gold leaf with the inscription, 'United States, Mail—Parcel Post.' The sides to be provided with eighteen inch panels and a wire screen extending from the tops of the panels to the top of the machine; the back to be provided with a tail gate eighteen inches high and a hinged wire screen extending from the top of the tail gate to the top of the machine, so that the back can be entirely locked with one lock; each machine to be equipped with wind shield and side curtain. Each machine to be used eight hours daily on week days and one machine to be used approximately three hours daily on Sundays in the delivery and* in the collection of mail at *Washington, D. C.*, on routes already established, or that may hereafter be established, and to be paid for at the rate of *Three thousand one hun-*

> *dred two dollars and fifty cents per annum for each equipment,* payments to be made on the first day of each month, or as soon thereafter as accounts can be adjusted and paid."

And so with the following quotation:

> "The UNITED STATES, party of the first part, covenants and agrees to and with the said *Josephus Wells,* party of the second part, to order of said party the equipments specified and described in this contract, which may be required by the Post Office Department at *Washington, D. C.,* during the period from *February 12, 1913,* to *February 11, 1917.*"

A further canon of interpretation established by the Supreme Court is:

> "That construction should be adopted which would be more to the advantage of the defendant on the general ground that a party who takes an agreement prepared by another, and upon its face incurs obligations or parts with his property, should have a construction given to the instrument favorable to him, and on the further ground that when an instrument is susceptible of two constructions—the one working injustice and the other consistent with the right of the case—that one should be favored which standeth with the right."
>
> Noonan v. Bradley, 76 U. S., 394-407.

With these three rules as guides, an examination of the Government's advertisement for proposals, of the re-

spondent bid, and of the resultant ~~the~~ written contract will now be undertaken. The purpose of this examination is to bring forward two of the primary purposes which it is conceived the parties mutually intended to accomplish, and which will serve to establish the meaning appropriate for Paragraph 3; those purposes appear to have been:

1. The supplying of whatever automobiles the Government might need for Parcel Post collections in the City of Washington during the period of four years.

2. The reservation to the Postmaster General of a practically effective power to prevent the continuance upon the streets of such equipment as became so worn and dilapidated as to disgrace and belittle the public service.

Every letter of the contract turns to these two propositions; to deny either of them is to make of the contract a senseless dribble of words. The intent of the Government to secure a time contract for a four-year term is first manifested by the advertisement for bids; this advertisement appears on page 14 of the Record and contains the following:

> "The service of four automobiles, properly equipped for the parcel post delivery and collection service, will be required for *eight hours each daily*, actual running service, except Sundays, when only one machine will be needed for three hours, actual running service. *One Relief machine to be on hand at all times*, to be used in cases of emergency. * * *
>
> "* * * The drivers or chauffeurs to be furnished by the contractor.
>
> "*The machines to be new*, equipped with substantial bodies painted and varnished a vermil-

lion red shade, and *lettered in gold leaf with the inscription 'United States Mail.'* The body to be, in size, approximately as follows: 9′ long, 4′ 10″ high, and 318″ wide at the bottom, inside measurements, at least 5′ 7″ of the length of the body to be exclusive of the seat and available for carrying capacity; *the body to be not more than 2′ 2″ from the ground; the sides to be provided with 1′ 6″ panels, and a wire screen extending from the tops of the panels to the top of the machine; the back to be provided with a tail gate 1′ 6″ high and a hinged wire screen extending from the top of the tail gate to the top of the machine, so that the back can be entirely locked with one lock;* the machines to be constructed with the engine in front, and with a running board on each side 1′ 6″ from the ground; a shield at the front and curtains at the sides; tires of the Motz type preferred.

*"The machines to be kept clean and in first-class condition at all times during the contract term.*

"* * * *Proposals to be submitted on the basis of a contract for four years; also the basis of a yearly contract;* and also with the understanding that *additional machines will be furnished at any time during the term of the contract* at a unit price to be stated. * * *

"Detailed information concerning the service to be performed may be obtained upon application to the Postmaster."

That the intention of the contractor was for a four-year contract is manifest from the bid of Wells (R. p. 15), "This bid is submitted on the basis of a *contract for*

*four years.* On a basis of a contract for one year, I submit a bid of $3,558.75 per car; it is understood that *additional cars will be furnished at any time during the term of the contract* at $3,152.50 per car."

That each party effected the mutual intention of securing a contract for four years is manifest from the contract itself (R. p. 6), which sets forth:

> "This contract * * * Witnesseth, that, *whereas the proposal* of the said Party of the Second Part for furnishing the said Department at Washington, D. C., in such numbers and in such numbers at a time, and from time to time according to such schedule as may be prescribed by the Postmaster of Washington, D. C., *during the period beginning February 12, 1913,* and *ending February 11, 1917,* the equipments and services hereinafter specified *was accepted* by the Postmaster General and contract therefore awarded to said party;
>
> "Now, therefore, the said Party of the Second Part hereby covenants and agrees to and with the said Party of the First Part as follows, to-wit:
>
> "1. That the said Party of the Second Part shall and will furnish and deliver at his sole risk and expense, in such numbers and in such numbers at a time as may be ordered by the Postmaster of Washington, D. C., in accordance with such schedule as he may prescribe during the *period beginning February 12, 1913,* and *ending February 11, 1917,* the following described equipments at the price herein specified, to-wit: Four automobiles with chauffeurs and such additional number of automobiles with the chauffeurs to be paid for pro rata, as may be required of the said party of the second part during the contract term,

*for use in the city delivery service of Washington, D. C. Each machine to be used eight hours daily on week days, and one machine to be used approximately three hours daily on Sundays* * * * and to *be paid* for at the rate of $3,102 50 *per annum for each equipment,* payments to be made *on the first day of each month,* or as soon thereafter as accounts can be adjusted and paid * * * (R. p. 9.)

"In consideration of the furnishing by the said Party of the Second Part of the equipments hereinbefore agreed by it to be supplied, and of his performance of all the other of the foregoing stipulations and agreements on his part to be kept or performed, each and all of which are hereby made conditions of this contract—*the United States,* Party of the First Part, covenants and *agrees* to and with the said Josephus Wells, Party of the Second Part, *to order of said Party the equipment specified and described in this contract which may be required by the Post Office Department at Washington, D. C., during the period from February 12, 1913, to February 11, 1917,* and to pay to the said Party of the Second Part for such equipment so supplied * * * at the price hereinbefore specified. * * * * "

The bond which the Government prepared and required Wells to give contained (R. p. 10):

"The conditions of this obligation are such that if the above-bounden Josephus Wells * * * shall well and truly and in a manner satisfactory to the Postmaster General furnish the equipment described in the foregoing contract executed on

6th February, 1913, by the principal herein, for *supplying to the Post Office Department* at Washington, D. C., *during the period beginning February 12, 1913, and ending February 11, 1917*, and in all other respects do and perform the covenants, agreements and stipulations of such contract on their part to be performed, then this obligation to be void and of no effect; otherwise, to remain in full force and virtue."

The Bill avers and the motion to dismiss admits (R. p. 3):

"At the taking effect of the contract, the plaintiff was *required by the United States of America to purchase five (5) new automobiles and their equipment* for use under said contract, and he did at that time *purchase five (5) new automobiles at a cash cost* to him *of $9,250*. In order to carry out said contract to the satisfaction of the United States of America, *the plaintiff was at the same time required*, and he did, *construct and equip a garage and repair shop* in which to house, repair and keep in first-class condition the said five (5) automobiles. The cash *cost* to the plaintiff *of constructing* a building into *a garage* with the necessary fire proofing and sewerage required by the regulations of the District of Columbia *was $2,535*; the necessary cash cost to the plaintiff for *equipping the garage* and machine shop, including electric wiring, electric motor, lathe, tools, air pump, shafting and pulleys, emery wheel, forge, oil tank, fire extinguishers, and electric light contract, *was $1,120*; in addition to which and necessary to the performance of said

> contract by the plaintiff he has paid out in cash for fire insurance premiums, liability insurance premiums, bond to the Government, for gasoline, lubricating oil, salaries, repainting and revarnishing said five (5) automobiles, *$12,799;* the reasonable rental value for his garage building for two years last past devoted to said contract is $1,200; the reasonable value for his own time and services for the two years last past devoted to the execution of said contracts is $4,000."

In view of the foregoing, wisdom will never conclude that the parties intended Paragraph 3 to give the Postmaster General the right to instantly annul the contract without cause. If he had power to annul the contract without cause, he might have annulled it the day after it was entered into; the moment after Wells had bought five new automobiles at a cost of nine thousand dollars which were useless for any other purpose than filling this particular contract with the Government; the moment after Wells had borrowed the money for, and built and equipped a garage suitable for no other purpose than to execute the contract.

Moreover, when several causes for annulment are specified in a contract, the rules of construction invite the conclusion that no other causes of annulment beyond those specified were contemplated by the parties. Again, the phrase contained in Paragraph 11 (R. p. 8) "The Postmaster may *annul* this contract and award a new contract for supplying such equipment" is not synonymous with the phrase (R. p. 7) "Any or all of the equipments contracted for herein may be *discontinued* at any time upon ninety days' notice from the said Party of the First Part," contained in Paragraph 3. The expressions do not mean the same; both expressions

are in the contract; the meaning of one is different from the meaning of the other; yet the Court of Appeals held them synonymous; held that the words: "Any or all of the equipments contracted for herein may be discontinued at any time upon ninety days' notice from the said Party of the First Part," reserved to the Postmaster General the right to annul the contract *without cause;* if this be true, why do *subsequent paragraphs No. 11 and No. 14, of the contract, specifically set forth causes for annulment?* Why do paragraphs 11 and 14 provide for an annulment upon specified causes, if a prior paragraph 3, was intended to reserve the right of annulment without any cause whatever? Manifestly, the parties intended by the words quoted from Paragraph 3 to provide for some other contingency than that contemplated by the "annulment" words contained in Paragraphs 11 and 14; the words, "discontinuing equipment" were intended to mean something different from and provide for some other contingency then the words, "annulling the contract."

The subject matter of the contract, together with the phraseology of the document itself causes readily to appear this other contingency for which the parties intended to provide.

The subject matter of the contract was an especial kind of public vehicles to discharge the important governmental function of collecting the United States mails upon the public streets of the National Capital in the open day, during business hours; that the good appearance and respectable serviceability of these mail-collecting automobiles was a matter of public and governmental concern is not to be gainsaid; that such was intended to be secured by the terms of the contract is manifest from its provision.

Thus: (R. p. 7.)

> "5. That the automobiles will be kept in good condition, and in good repair, painted and varnished in a thorough manner, clean and in good condition, and lettered *and ornamented,* all in a manner to be approved by the said Postmaster."

It was appropriate to settle on some practical method making absolute to the Postmaster General a way of instantly enforcing this provision of the contract, rather than to leave to the United States only an action in damages for its breach, or a right to annul the contract in its entirety for failure in this respect, and thereafter to go without any mail collections until it could proceed again into the market for the securement of another and perhaps less advantageous contract. What method could be devised to assure to the Government during the four years of the contract the practical control of the appearance and condition of the equipment which went out publicly upon the streets? It is true that Paragraph 11 (R. p. 7) provides for "fines" to be imposed by the Postmaster General for "Failure to keep the equipment in first-class repair and properly painted," but fines *do not assure the discontinuance of dilapidated equipment;* the contractor may pay the fines, and in broken down equipment rattle the public service along into disrepute as before.

It is further true that Paragraph 11 provides, "for repeated delinquencies" the Postmaster General may "annul" the contract; but "annulment" may be disadvantageous to the Government; hourly schedules of mail collection are to be maintained, interruption would mean confusion and disaster; another contract may not be had on terms so satisfactory as the first; indeed, there exist many reasons why the Postmaster General might not wish to "annul" for the single failure to supply new

equipment to replace that which had become unserviceable beyond repair, or unsightly beyond redemption. Neither "fines" nor "annulment" supplies for the Government a practical method of forcing equipments to be kept up in first-class appearance and condition during the period of four years; how then, is this to be achieved? It can be accomplished in but one way; by empowering the Postmaster General to discontinue and put out disreputable equipment, without thereby "annulling" the contract.

Such a power of discontinuance would require as well some contractual provision for supervision which would enable the Postmaster General to inspect every part of the equipment in use by the contractor and thus inform himself of its state and condition. This the contract supplies (R. p. 7):

> "8. That the full equipment will be submitted to the inspection of the said Postmaster at such times and places as he may designate."

So that the prerogatives reserved to the Postmaster General were three:

1. The power to *fine* for "failure to keep the equipments in first-class repair and properly painted."

2. The power to *discontinue* equipment.

3. The power to *annul* the contract for *repeated* failures or delinquencies or for violations of the postal laws and regulations, or for failure to renew the bond when so required.

Thus, even if Paragraph 3 is susceptible of two meanings (one that accorded by the Court of Appeals) yet one meaning is in harmony with Paragraphs 11 and 14, while the other is utterly inconsistent therewith, and renders the provisions of Paragraphs 11 and 14 upon the point of

annulment for cause, utterly impotent, superfluous and senseless.

There exist reasons other than that above discussed, why the Government might desire to "discontinue equipment" without "annulling the contract;" the trial Court found (R. p. 17):

> "The proper interpretation of the paragraph is that the use of all or any of the automobiles may be discontinued according to the volume of the business to be done by the Post Office at the time for which they were to be used. If the contention of the Government is sound, it might have given notice of termination the day after the plaintiff equipped himself with the automobiles, and an interpretation which would give such power to the defendant would certainly be unreasonable. No one would contract with the Government in a matter of this kind on any such basis if clearly understood."

If a phrase is susceptible of two meanings depending upon whether the paragraph stands isolated and alone, or whether it stands associated with other terms, and the other terms are in conflict with the meaning which the phrase might have if it stood isolated, it thereby becomes apparent that the parties intended it to convey the meaning which goes along with the other terms and did not intend that meaning which runs counter to the other terms. So it is with Paragraph 3: To say that Paragraph 3 provides that the Government may annul the contract without cause, is to wipe out the whole of Paragraphs 11 and 14, and each of the several provisions which they contain; to say that Paragraph 3 provides for the "discontinuance of equipment" *without* annulling

the contract harmonizes with each provision contained in Paragraphs 11 and 14, and gives operation to the specified causes of annulment therein contained. To say that Paragraph 3 means that the Government might annul the contract without cause is in conflict with the proposal for bids, which required *four new machines built in such manner as to be utterly useless except for collecting the Government mail*, and in conflict with "*proposals to be submitted on the basis of a contract for four years; also the basis of a yearly contract.*" To say that Paragraph 3 means that the Government may annul the contract without cause is in conflict with the proposal of Mr. Wells in reply to the advertisement; "This bid is submitted on the basis of a contract *for four years*. On the basis of a contract *for one year*, I submit a bid in $3,558.75 per car." To say that Paragraph 3 means that the Government may cancel the contract without cause is in conflict with the contract itself which states: (R. p. 6) "Whereas the proposal of the said Party of the Second Part for furnishing * * * *during the period beginning February 12, 1913, and ending February 11, 1917*, * * * *was accepted* by the Postmaster General;" it conflicts with "Party of the Second Part shall and will furnish * * * *during the period beginning February 12, 1913, and ending February 11, 1917* * * * four automobiles with chauffeurs, and such additional number of automobiles with chauffeurs to be paid *for pro rata as may be required* * * * *during the contract term*, for use in the city delivery service of Washington, D. C. * * * letters in gold leaf with the inscription 'United States Mail—Parcel Post,' *to be paid for at the rate of $3,102.50 per annum for each equipment* * * * that the automobiles shall be *new at the beginning of the contract term;* * * * that not less than one extra equipment to take the place of such as may be tempo-

rarily disabled or withdrawn from the service, will *be kept on hand without extra compensation therefor;* * * * that *during the period covered by this contract, in the event the Party of the Second Part should fail to furnish the equipments* * * * *current requirements may be supplied by procuring in the open market* equipments of the character agreed to be supplied under this contract; * * * that neither this contract nor any interest therein shall be transferred or assigned by the Party of the Second Part * * * that at any time during the continuance of this contract, the Postmaster General may require new or additional sureties upon the bond hereto annexed; * * * that the annulment of this contract * * * shall not release or impair its obligation upon said Party of the Second Part and the sureties upon his bond, * * * but the liability of the said Party of the Second Part and his said sureties, * * * shall subsist notwithstanding such annulment * * * as fully as if this contract in all respects continued in force and effect; * * * the *United States, Party of the First Part, covenants and agrees to* and with the said Josephus Wells, Party of the Second Part, *to order of said Party the equipment specified and described in this contract, which may be required by the Post Office Department at Washington, D. C., during the period from February 12, 1913, to February 11, 1917.*"

To say that Paragraph 3 means that the Government may annul the contract without cause is in conflict with the conditions of the bond which the Government required:

> "The conditions of this obligation are such that if the above bondant Josephus Wells * * * shall well and truly * * * furnish the equipment described in the foregoing contract * * * for

supplying to the Post Office Department at Washington, D. C., *during the period beginning February 12, 1913, and ending February 11, 1917.*"

From the foregoing it appears that the meaning accorded to paragraph 3 by the Court of Appeals cannot be reconciled with either

1. The advertisement for bids prepared by the United States.
2. The bid in response to the advertisement.
3. The resultant contract prepared by the United States.
4. The Bond prepared by the United States.

The conclusion that Paragraph 3 was intended to give the Government the right to *annul the contract without cause*, is not to be arrived at by the process of reasoning.

## WAS THE SUIT AGAINST THE UNITED STATES?

If the parties to an executory contract are with mutual satisfaction each carrying out its terms, and a "third party" undertook by physical or other means to interrupt and prevent its further completion, not only would a suit for injunction lie against him, but that particular suit would not be a suit against either of the contracting parties. The appellant does not hesitate to admit that if the contractual status between him and the United States had been actually undone and destroyed by breach *before* he filed his Bill against the defendant, if Wells had either rightly or wrongly been put out of contractual relations with the United States before he filed his Bill, so that the contractual status between him and the United States did not exist at the time he filed his Bill, then a suit, the purpose of which was to restore him to a contractual status with the

United States, would in effect be a suit against the United States. For, while the United States has no agent or officer empowered by law to *break* its existing contracts, yet it does have agents and officers authorized by law to *admit persons to contractual status* with the United States, and a suit against such an officer as had lawful power to admit to the contractual status with the United States would be a suit to control an officer of the United States in the discharge of a function which by law belonged to him to discharge on behalf of the United States; therefore, the suit would be in effect against the United States. A suit against an officer to require him to perform a discretionary function which the law vests in his office and *empowers* him to perform, is quite different from a suit to prevent individuals who happen to hold public office from perpetrating an *unlawful act* which is not a function of the office which he happens to hold, and which no law of the United States authorizes him to commit on its behalf or on any other behalf. If it were possible for an Assistant Postmaster General of the United States to be ill-minded, can it be that such a one could be suffered without cause wilfully to annul all of the many thousands of time contracts which the Post Office Department has with railroads and other common carriers for the carrying of the mails, and successfully plead to all suits brought against him either by contractors or by the United States itself, that each suit was *against the United States* and thus go unhindered and uncontrolled? Suppose that instead of Wells, the Attorney General of the United States had instituted this action against the defendant, and had averred as the Bill at bar avers, that the contract was desirable for and advantageous to the United States; that the defendant unlawfully intended to interfere with it and unlawfully to prevent its execution in the future, and praying that

he might be enjoined from so doing; would such a suit by the Attorney General against the Defendant be a suit against the United States? To make such a suit out of that pending at bar no more would be necessary than to change the name of the plaintiff in the title of the cause.

It is only because the defendant happens to hold public office that any mind can hesitate over the question whether this particular defendant, who happens to be also an officer of the United States, is or is not, for the purposes of the suit at bar, a "third party" in respect to his proposed interfering with an existing and mutually satisfactory contract between the United States and a citizen.

If the defendant is but a "third party" unlawfully proposing in the future to interfere with and prevent the execution of an existing contract, then a suit against him is not in effect against the United States; but if the defendant is the agent of the United States for the purpose of repudiating and throwing out its validly existing executory contracts, then his action in so doing is the action of the United States, and a suit against him to prevent such acts upon his part would be a suit to control an agent of the United States in the execution of his authority on behalf of the United States, and would be in effect a suit against the United States.

In short, in order for the suit to be "against the United States" the act complained of must be an "official act;" that is, one to which the Postmaster General was empowered by law, and therefore belonging to whoever at the time held office.

So that the question, "Is the suit in effect against the United States?" turns on whether the defendant is agent of the United States, authorized to perform on its behalf the threatened unlawful future act of which the appellant complained; and the threatened future act is

to physically and unlawfully prevent the United States and a citizen from completing an existing time contract lawfully made and mutually just. Is law supposed to vest in the First Assistant Postmaster General official power to unlawfully cancel, without cause, the contracts of the United States and of its citizens?

Even though the defendant be First Assistant Postmaster General, due humility may venture to doubt that the identity of the United States is lost in his personality; and even to question whether his powers over the contracts of the United States are broader than those which belong to the office which he distinguishes; and moreover, to doubt whether, while he is in office, he can effectually direct against the rights of citizens any powers save such as are vested in First Assistant Postmasters General by the law of the land.

> "The ratio decidendi in this class of cases is very plain. A defendant, sued as a wrongdoer, who seeks to substitute the State in his place, or to justify by the authority of the State, or to defend on the ground that the State has adopted his act and exonerated him, can not rest on the bare assertion of his defense. He is bound to establish it. The State is a political corporate body, can act only through agents, and can command only by laws. It is necessary, therefore, for such a defendant, in order to complete his defense, to produce a law of the State which constitutes his commission as its agent, and a warrant for his act."
>
> Poindexter v. Greenhow, 114 U. S., 288.

The official duty and the official oath of the defendant required him, as it required every other officer and citi-

zen of the United States, to respect and permit effect to this contract, because it came into existence by virtue of the Constitution and laws of the United States.

Not only is there no law undertaking to vest Mr. Roper with official power to impair existing contracts, and none such could be sustained; even the whole of Congress itself could not annul this contract by specific legislation, and thus deprive Wells and the United States of their property "without due process of law," for a contract is "property."

The purpose of the suit was to prevent a defendant, who happens to hold office, from unlawfully destroying a contractual status which existed between Wells and the United States; *this contemplated act of the defendant was either lawful, or it was unlawful; if it was unlawful, it could not be official, because an official act is one authorized by law, and therefore a lawful act;* the act being unlawful, therefore unofficial, is not the act of an officer of the United States as such, but is the personal and private project of an individual who happens also to hold public office; and being thus the act of an individual person and not an act of the United States through an officer having official power to perform it, the defendant in this personal and individual interference with the contract between Wells and the United States is as much a "third person," and as much an outsider as the veriest unidentified stranger.

Suppose the General of the Army or the Admiral of the Navy should undertake with a file of men at the Post Office to drive Wells and his automobiles off, prevent his collection of mails and prevent the completion of this contract, would an injunction suit against him be in effect a suit against the United States, and if not, why not? That he was a high official of the United States, ranking with even the defendant, would likely be con-

ceded; but the fact that he was an officer, even a very high officer, would not settle it; it would depend on whether he possessed official power to perform the act for and on behalf of the United States; and inasmuch as official power can be conferred only by law, the absence of such a law would make the act unlawful, therefore unofficial, and if unofficial, private and personal.

AN ILLEGAL ACT IS NEVER AN "OFFICIAL ACT," AND NEVER THE ACT OF THE STATE, IT IS ALWAYS THE INDIVIDUAL TORT OF THE PERPETRATOR, AND INJUNCTION OR MANDAMUS WILL CONTROL HIM.

Wadsworth v. Boysen, 148 Fed., 771, was a suit to enjoin the United States Indian Agent from obstructing the complainant from prospecting in land of an Indian Reservation; although the defendant claimed to be acting in his official capacity as a representative of the Government, the Court, after examining the powers vested by law, concluded that that which he claimed did not belong to him, and announced that the suit "is one to restrain an individual tort which would result in irreparable injury to complainant, and not one against the United States," and further said (P. 780):

> "The injunction seeks to stay the hand of an individual wrongdoer, to prevent irreparable mischief to the complainant; and consequently such wrongdoer can not be acting for and in behalf of the Government, which stands for the embodiment of law and lawful procedure."

In McConnaughy v. Pennoyer, 43 Fed., 196, the Court having concluded that certain official power which was

claimed by a Board of Commissioners did not belong to them, said on page 203:

> "This being so, the defendants are acting without the authority of law * * * without the authority of the State. They do not represent the State. The State is not a party to this suit and therefore the court has jurisdiction with the same as a suit between private persons who are citizens of different States."

And in Board of Liquidation v. McComb, 92 U. S., 531:

> "A State can not be sued by an individual without its consent * * *.
>
> "But when a plain official duty, requiring no exercise of discretion, is to be performed and performance is refused, any one who will sustain personal injury by such refusal may have a mandamus to compel its performance.
>
> "And when such duty is threatened to be violated by some positive official act, any one who will sustain personal injury thereby, for which adequate compensation can not be had at law, may have an injunction to prevent it.
>
> "* * * if in either case the officer plead the authority of an unconstitutional law, for the nonperformance or violation of his duty, it will not prevent the issuance of the writ."

The Supreme Court of the United States in a certain discussion about "suits against the State," said:

> "But in the desire to do that justice, which in

> many cases the Courts can see will be defeated by an extreme extension of this principle, they have in some instances gone a long way in holding the State not to be a necessary party, though its interests may be more or less affected by the decision. Among these cases are those where an individual is sued in tort for some act injurious to another in regard to person or property, in which his defense is that he has acted under the orders of the Government.
>
> "In these cases he is not sued as an officer of the Government, but as an individual, and the Court is not ousted of jurisdiction because he asserts the authority of such officer. To make out that defense he must show that his authority was sufficient in law to protect him."
>
> Stanley v. Schwalby, 147 U. S., 518.

Again, in reviewing the decisions upon the same subject that Court said:

> "We have no doubt the principle of these decisions applies to a case wherein it is contended that the act of the head of a Department under any view that could be taken of the facts that were laid before him, was ultra vires and beyond the scope of his authority. If he has no power at all to do the act complained of, he is as much subject to an injunction as he would be to a mandamus if he refused to do an act which the law plainly required him to do."
>
> Noble v. Logging Co., 147 U. S., 171-2.

In confirming an injunction restraining the Post-

master General from excluding certain matter from the mails, the same Court said:

> "That the conduct of the postoffice is a part of the administrative department of the government is entirely true, but that does not necessarily and always oust the courts of jurisdiction to grant relief to a party aggrieved by any action by the head, or one of the subordinate officials, of that department, which is unauthorized by the statute under which he assumes to act. The acts of all its officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief."
>
> School of Magnetics v. McAnnaulty, 187 U. S., 94.

Further quotations from the authorities upon the point will not be indulged in; other cases which contain the question and which were resolved against officials who, when sued concerning illegal conduct, claimed that the conduct being that of an official, the suit was in effect one against the State, are:

Osborn v. Bank of U. S., 9 Wheat, 738.
U. S. v. Lee, 106 U. S., 196.
Wells v. Nichols, 104 U. S., 444.
Scranton v. Wheeler, 179 U. S., 141.
Kendall v. U. S., 12 Peters, 524.
Hartman v. Greenhow, 102 U. S., 672.
U. S. v. Douglas, 77 U. S., 15.
Garfield v. U. S., 211 U. S., 250.

Instances in which actions were in effect against the

State and in which for that reason that defense was sustained, clearly distinguish themselves from the case at bar. They are:

U. S. ex rel. Levey v. Stockslager, 129 U. S., 470.
Louisiana v. Garfield, 211 U. S., 70.
Oregon v. Hitchcock, 202 U S., 56.
Belknap v. Schild, 161 U. S., 10.
Postal Supply Co. v. Bruce, 194 U. S., 601.
Carr v. U. S., 98 U. S., 433.

In Truax v. Raich, 239 U. S., 33, an alien sued the Attorney General of the State of Arizona to enjoin the enforcement of a labor law which he asserted was repugnant to the Federal Constitution; the Court held that the law being unconstitutional was no law at all; that the Attorney General of the State was not vested by law with the power which he was about to exercise, that therefore the contemplated act being unlawful was not an act of the State through its officer, and that a suit to enjoin it was not a suit in effect against the State; the Court on page 37, said:

> "As the bill is framed on the theory that the act is unconstitutional, and that the defendants, who are public officers concerned with the enforcement of the laws of the State, are about to proceed wrongfully to the complainant's injury, through interference with his employment, it is established that the suit cannot be regarded as one against the State."

Language more appropriate to the case at bar could not be evolved: "The defendant who is a public officer

concerned with the enforcement of the laws of the United States, is about to proceed wrongfully to the complainant's injury, through interference with his employment by the United States."

In the same case upon page 38 appears:

> "The right to earn a livelihood and to continue in employment unmolested by efforts to enforce void enactments, should similarly be entitled to protection in the absence of adequate remedy at law."

Of the paragraph quoted the words "void enactments" are synonymous with the words "unlawful acts;" and if these latter were substituted for the former the case at bar would appear.

The Truax v. Raich doctrine was affirmed in Tanner v. Little, 240 U. S., 369, wherein the Attorney General of the State of Washington was enjoined from a threatened interference. In Ex parte Young, 209 U. S., 123, it was held that a Federal Court might enjoin the Attorney General of a State whose general duty it is to enforce the State Statutes, from undertaking to enforce against persons affected, a statute which violated the Federal Constitution. On pages 159-160 the Court said:

> "The answer to all this is the same as made in every case where an official claims to be acting under the authority of the State. The act to be enforced is alleged to be unconstitutional; and if it be so, the use of the name of the State to enforce an unconstitutional act, to the injury of complainant is a proceeding without the authority of, and one which does not affect the State in its sovereign or governmental capacity. It is simply

> an illegal act upon the part of a State official in attempting, by the use of the name of the State, to enforce a legislative enactment which is void because unconstitutional."

Is it not apparent from these cases, that if a legislature had affirmatively passed an act which directed the defendant to cancel Wells' existing contract with the United States, that act would be unconstitutional and an injunction would lie? If the State by its legislature could not create a law which would render the defendant immune from such an injunction, how can he be immune under the principles of existing law? If his act is unlawful and therefore not authoritative or official, the mere fact that a legislature undertook to authorize it by an unconstitutional act, could not be creative of the cause for an injunction; the cause for injunction lies in the absence of legality for the act, whether the act be prompted by an unconstitutional statute or be prompted by other initiatives; if the act be unlawful, it is illegal, and unofficial; and if illegal and unofficial, a suit to restrain it is in no sense a suit against the State.

That the suit was not in effect against the United States, is now made plain.

## HAD COMPLAINANT AN ADEQUATE REMEDY AT LAW?

It is the functions of Courts to decide cases, not abstract questions of law; it is the business of Courts to evolve and apply to the facts of a matter the rules which the law contains for application to such particulars; a rule of law quite applicable to one case begins to lose its application to another case when the facts of the second case begin to differ from the facts of the first; so that after a while the facts of two cases may so differ

as that the rule appropriate for the one is no rule at all for the other. If the suit at bar is in effect a suit against the United States, then no need to discuss the second and present question; if the second question needs to be discussed, it is only upon the assumption that the suit is not in effect against the United States; and this means, that not being against the United States, it is not against a party to the contract; and not being against a party to the contract, it is against a third person, a stranger to the contract, who is proposing to interfere with its execution, determined to prevent its completion, and who has set out to break it up.

The relief prayed was an injunction against this third party, stranger to the contract, to prevent his unlawful and tortious interference; the *United States* is not here urging that the complainant has against it an adequate remedy at law, but here comes the third party, the stranger to the contract, who has unlawfully set out to break it up; and *he* says when an injunction is sought against him by a party to the contract, and he says it to a Court of Equity, "Pray don't prevent my breaking up that contract between those two; don't interfere with my proposed destruction of the property which the two of them have in their contract; and put your refusal upon the ground that the complainant has an adequate remedy at law."

Does he tell us against whom the "remedy at law" is? Whether against him personally, or against the United States? If he says that the complainant's remedy at law is against him Mr. Roper personally, and not against the United States, the answer is that such a defense by third persons for interfering with other people's contracts has never been favorably received and never sustained by a proper application of the doctrines of equity,

and a correct understanding of the functions and duties of its Courts.

If the defendant means to say that the complainant has an adequate remedy at law against the United States, analysis of the situation presents more replies than one.

First, an interesting query which arises thus:

If the defendant was without power to annul the contract, if he was without power to prevent its completion, then his act in so doing was not an act of the United States; the United States would not be responsible for it, the United States would not have broken the contract and the complainant would have no remedy at all against the United States.

The logic of the foregoing conclusion is not to be escaped.

But, assuming for the moment that the United States were responsible, how and to what extent could that responsibility be enforced against the United States for the benefit of the complainant?

Manifestly only to the extent that an action in the Court of Claims would afford relief; because, assuming the liability of the United States as for a breach of contract, no redress can be had against the United States, except through a proceeding in the Court of Claims, that being the only relief affirmatively authorized by statute for such cases. The proposition is, therefore, narrowed to the claim that a proceeding in the Court of Claims would afford the complainant "an adequate remedy at law."

The phrase "an adequate remedy at law" contains more than one single proposition; it contains distinctly three.

First, "a remedy;" second, "an adequate" one; third, "at law."

It will now be undertaken to show that a proceeding in the Court of Claims satisfies neither of the three essentials to this particular defense.

Premising the argument, however, by recalling that "the same principles of right and justice which prevail between individuals should control in the construction and carrying out of contracts between the Government and individuals."

U. S. v. Stage Co., 199 U. S., 423.

Is the proceeding in the Court of Claims "an adequate remedy?" Or, indeed, is it any "remedy" at all? Webster says that the law-meaning of the word remedy is "The legal means to *recover a right*, or to *obtain* redress of a wrong."

A finding of the Court of Claims is not a "judgment" in the sense of a judgment of a law court, which is enforcible by the process of execution; a finding of the Court of Claims in favor of a litigant individual is neither enforcible nor collectible as a matter of right; its effect is only advisory to Congress upon questions of fact, but in no sense obligatory upon the United States with respect to liquidation; the statute upon the subject, section 143 of the Judicial Code, provides only that the Clerk of the Court of Claims shall transmit to Congress a statement of all the judgments rendered by the Court during the previous year; there is no law requiring the payment of such judgments and they can not be paid without Congress sees fit to make an appropriation to provide for their payment.

Entering the Court of Claims is an abandonment of all possibility of enforcing redress *as a matter of right*, and leaves the matter altogether in the discretion of Congress.

If there were no statute which permitted suit to be

instituted against the United States, doubtless the very fact that the Government could not be sued would be ground for injunctive relief against the individual defendant; and equitable relief is not to be withheld merely because some kind of a statutory proceeding can be *instituted* by the complainant; the reason is that the privilege to *institute* a statutory proceeding does not amount to a "remedy." "Remedy" consists in *obtaining redress as a right*, not in begging about for it as a favor.

Again, even if it be thought that a proceeding in the Court of Claims is a "remedy," can it be said that it is a remedy "at law?"

> "Suits against the Government in the Court of Claims, whether reference be had to the claimant's demand, or to the defense, or to any setoff or counter-claim which the Government may assert, are not controlled by the seventh amendment. They are not suits at common law within its true meaning."
>
> McElreth v. U. S., 102 U. S., 440.

The only "remedy at law" for breach of a contract is the common law action of damages for breach, which contains a jury trial and the process of execution, both as a matter of distinct right. The seventh amendment of the Constitution provides: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved * * *" so that no "remedy" is a "remedy at law" for breach of contract unless it contains the rights to a jury trial and a writ of execution.

> "The trial by jury is justly dear to the American people. It has always been an object of deep

> interest and solicitude, and every encroachment upon it has been watched with great jealousy. * * *
>
> "By 'common law' the framers of the Constitution of the United States meant what the Constitution denominated in the third article, 'Law;' not merely suits which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined in contradistinction to those where equitable rights alone were regarded, and equitable remedies were administered."
>
> Parsons v. Bedford, 3 Peters, 433.
>
> See also Trust Co. v. Shoenfelt, 153 Fed., 484.
>
> Thomas v. Council Bluffs, etc., 92 Fed., 424.

In Hipp v. Babin, 60 U. S., 279, the Court said:

> "And the result of the argument is, that whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a *constitutional right to a trial by jury.*"

If this principle be applicable to one of the parties to litigation, it is applicable also to the other; if the *law* affords any particular complainant an *adequate* remedy, he must concede the right of a defendant to a jury trial and take his case to law; conversely, a statutory proceeding which denies the complainant a jury trial for the violation of a common law right (breach of contract) which denies him a judgment which can be en-

forced by the writ of execution, is not in the nature of things the remedy which the common law contains for that kind of a wrong.

The sixteenth section of the judiciary code of 1789 (Judicial Code, section 267) provides: "Suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate and complete remedy may be had at law." This reference to the remedy at law does not contemplate statutory proceedings which were unknown to the Common Law; as said in Peck v. Ayers, 116 Fed., 274, it "intends the remedy at common law, as it existed at the date of the Judiciary Act, and does not refer to remedies which might be thereafter given by the statutes of the State in their own courts."

From the foregoing it is manifest that a proceeding against the United States in a Court of Claims is not a "remedy," for the reason that it gives no *right* to actually *obtain* and *secure* even financial redress in the form of money damages.

A proceeding in the Court of Claims is not "at law" for the reason shown above. Even if such a proceeding were a "remedy," and was "at law" yet in the case at bar it is manifestly not "adequate."

The peculiar equities of the case already quoted from the bill on pages 6, 7 and 8 ante, are such that the very rights which are most vital to the complainant could not be the subjects of or be measured in the elements of damages for a breach of this particular contract. The plaintiff on securing the contract staked his whole future and all of his resources upon his faith in the honor and integrity of his Government; he borrowed $11,000.00 to equip himself and has no means except the proceeds of the contract to repay the loan; could he recover the amount of this loan in an action for damages and thus satisfy his creditors? Manifestly not, and even if he

could, his credit would be ruined and he financially destroyed years before his claim could be even tried.

Could he in an action for damages recover what it cost to turn the building into a garage and to equip it as a garage and a machine shop? And even if he could, would he in such action be permitted to recover for loss in rental value of the garage premises? Clearly not, and even if one were disposed to answer "Yes, he could recover this," yet how could the measure of damages be determined? It is not a question of ascertaining and applying the measure of damages for a physical injury to real property which was producing an ascertainable rental value; nor is it a question of the measure of damages for withholding the physical possession of real property possessing a rental value; it is a case of the adaption of real estate which is in no way inherently connected with a contract so that it is of great value in connection with the contract, but of no value without the contract; and the nature of the changes made to render it adaptable to the contract are such as to *destroy the rental value which it did once possess and leave it unsalable, unmarketable and without rental value in its present state.* How is this resultant loss recoverable, or if recoverable, how is it to be measured in an action for breach of contract?

Again concerning the five automobiles—

The bill states (R. 4) that because of the peculiar construction and equipment required by the contract, they are of no practical value except for handling the mails and for the execution of the contract; and if the defendant is permitted to break up the contract, the automobiles will be useless to the complainant, will be practically unsalable and of a trifling and insignificant market value, solely because equipped for the contract, while they are worth their original cost in the execution of

the contract. How can this particular loss be an element of damages, and how measured in an action for breach of contract?

Finally, there are involved considerations of public policy which in themselves alone would seem to require recognition of the propriety of the suit.

1. Are gentlemen who happen to be inducted into public office to be encouraged or permitted during their ephemeral incumbency to unlaw the Government's Departments, dissunder the Government's affairs, to illegally upturn the contractual status of the Government with its contractors, to deprive the Government and the public of the benefit of advantageous contracts and wantonly to run amuck over the property rights of both citizens and Government? Is it conducive to the welfare of Government and of the general public to establish as a rule, that while interference with the performance of Government contracts by most persons is confessedly unlawful, yet the law has no means of preventing such interference if the wrongdoer happens to have hold on some public office? Will it be conducive to general and competitive dealings with the Government for the Courts of the country to put forth to the public the assurance that those who enter into executory contracts with the Government must understand that if an intermeddling wrongdoer happens to hold office, he will for the time being be permitted to interrupt and break up contract no matter how illegal, unwarranted, and unlawful his act may be in point of law, and no matter how immoral, unjustifiable, destructive, and unfair in point of equity? No responsible person and no established business concern would or could afford to deal with such a Government; the field of supplying the Government requirements would be and ought to be abandoned to the adventurers who are equally unreliable. Again, does it

make in favor of or against public policy to permit officers by acts confessedly illegal, unlawful, and beyond their official power, to subject the Government to claims for large damages and thus suffer the public purse and the money of the people to be pirated for their payment?

As was said by the Supreme Court in Walla Walla v. Water Works, 172 U. S., 12:

> "This Court has repeatedly declared in affirmance of the generally accepted proposition that the remedy at law, in order to exclude a concurrent remedy at equity, must be as complete, as practical, and as efficient to the ends of justice and its prompt administration as the remedy in equity * * *. Where irreparable injury is threatened, or the damage be of such a nature that it can not be adequately compensated by an action at law, or is such, as from its continuance, to occasion a constantly recurring grievance, the party is not ousted of his remedy by injunction. In such a case as this, the remedy will save to one party or the other a large pecuniary loss—to the city, if it be obliged to pay to the plaintiff damages occasioned by the establishment of its competing works; to the plaintiff, if it be adjudged that the city has a right to do so."

In Boyce's Executors v. Grundy, 3 Peters, 210:

> "This Court has been often called upon to consider the sixteenth section of the Judiciary Act of 1789, and as often, either expressly or by the course of its decisions, has held that it is merely declaratory, making no alteration whatever in the rules of equity on the subject of legal remedy.

> "It is not enough that there is a remedy at law; it must be plain and adequate, or in other words, as practical and as efficient to the ends of justice and its prompt administration as the remedy in equity."

Cases innumerable could be shown where the phraseology "It is not enough that there is a remedy at law, it must be plain and adequate" appears; so far as Courts have announced the general legal rule, there is no trouble; but equity is more a matter of conscience than it is of law.

Equity is the medium for attaining adequate justice in those cases wherein the law by reason of its universality is deficient.

As heretofore observed, Courts are constituted to decide cases, not abstract questions of law. The case at bar can not justly be decided without a just consideration of the facts laid down in the bill, and a conscientious balancing of those particular facts against the adequacy and the efficiency of a proceeding against the United States in the Court of Claims, which is not a "Court" in the sense of the Common Law—without a trial by jury—without the right to a strict judgment if successful—without the right to an execution—without the right to enforce payment of an award for damages—without the right to recover as damages the elements pertaining to both person and property, which are most destructive to the complainant—can this mere opportunity for mendicancy be honestly said to constitute "an adequate remedy at law?"

Fortunately and unusual for an equity case, there is an instance in the books on all fours with the case at bar in so far as certain of the facts which it contains have by high authority been held in themselves alone

not only to justify, but to require equitable intervention; it is that of Watson v. Sutherland, 72 U. S., 74. In that case as in this, it appeared (P. 75) that the plaintiff "was a young man, recently engaged on his own account in merchandising, and if his store was closed, the goods taken from him, or their sale even long delayed, he would not only be rendered insolvent, but his credit destroyed, his business wholly broken up and his prospects in life blasted;" for these reasons alone the injunction was granted, and the Court said (P. 79):

> "Loss of trade, destruction of credit, and failure of business prospects are collateral or consequential damages, which it is claimed would result from the trespass, but for which compensation can not be awarded in a trial at law.
>
> "Commercial ruin to Sutherland might, therefore, be the effect of closing his store and selling his goods, and yet the common law fails to reach the mischief. To prevent a consequence like this, a court of equity steps in, arrests the proceedings in limine; brings the parties before it; hears their allegations and proofs, and decrees either that the proceedings shall be unrestrained, or else perpetually enjoined. The absence of a plain and adequate remedy at law affords the only test of equity jurisdiction, and the application of this principle to a particular case must depend altogether upon the character of the case, as disclosed in the pleadings. In the case we are considering, it is very clear that the remedy in equity could alone furnish relief, and that the ends of justice required the injunction to be issued."
>
> Watson v. Sutherland, supra.

"A remedy at law must be complete and ample, not doubtful and uncertain, in order to deprive a party of his remedy in equity."

Edsell v. Briggs, 20 Mich., 429.

"A bill in equity may be sustained solely on the ground that it is the most convenient remedy."
Cavenaugh Sons Co. v. Jackson, etc., 186 Pa. St., 443.

"The application of the rule that equity jurisdiction can not be invoked where there is an adequate remedy at law depends on the circumstances of the particular case and rests in the sound discretion of the Court, where there are any circumstances which show that the legal remedy may not be perfect and complete."
Mutual Life Ins. Co. v. Pearson, 114 Fed., 395.

"The objection that the defendant has a complete remedy at law for the wrong of which he complains in his cross-bill can not be sustained unless the remedy at law is 'as practicable and efficient to the ends of justice and its prompt administration as the remedy in equity.'"
Springfield Milling Co. v. Barnard, etc., 81 Fed., 261.

That the judgment of the Court of Appeals should be reversed, and the case remanded for appropriate proceedings is

Respectfully submitted,

DANIEL THEW WRIGHT,

T. MORRIS WAMPLER,

*For Appellant.*

Supreme Court, U. S.
FILED
DEC 18 1917
JAMES D. MAHER,
CLERK

IN THE

# Supreme Court of the United States

JOSEPHUS WELLS, *Appellant*,
vs.
DANIEL C. ROPER, *Appellee*.

October Term, 1917
No. 168.

## BRIEF IN REPLY TO CLAIM THAT CASE IS "MOOT"

DANIEL THEW WRIGHT,
*Attorney for Appellant.*

Judd Printing Company, Washington



IN THE

# Supreme Court of the United States

JOSEPHUS WELLS, *Appellant*,
*vs.*
DANIEL C. ROPER, *Appellee*.

October Term, 1917
No. 103.

## BRIEF IN REPLY TO THE CLAIM THAT THE CASE IS "MOOT."

A "controversy" is one thing; the remedy is another. A "controversy" is none the less such because a party to it happens to ask for inapt relief. The "controversy" at bar is whether or not the defendant had a right to cancel the plaintiff's contract; if not, plaintiff was entitled to some remedy either at law or in Equity; unfitness of one remedy does not settle the "controversy" nor wipe out the right to the other.

The Court of Appeals has determined that the defendant did have the right to cancel the contract; so long as that decision stands it is "res judicata" and settles the "controversy" against the plaintiff, and will prevent relief in the Court of Claims or in any other court which the plaintiff may seek, unless that decision is reversed here. The Court of Appeals has decided not only that appellant is not entitled to relief in Equity, but also that he is not entitled to relief at law; that conclusion is upon the view that the defendant had the right to cancel the contract; this finding of the Court of Appeals if unreversed, can be successfully pleaded as a defense of *res judicata* in any action the plaintiff might bring in the Court of Claims or elsewhere. The "controversy" is over the meaning of the contract and the plaintiff's rights under it; the question of appropriate remedy is ancillary to, but is not the "controversy." Both the statutes, and Equity Rules, provide for the situation; Section 274a of the Judicial Code, in a Chapter entitled, "Provisions common to more than one court" (Act March 3, 1915, C. 90) provides:

> "In case any of said courts shall find that a suit at law should have been brought in equity or a suit in equity should have been brought at law, the court shall order any amendments to the pleadings which may be necessary to conform them to the proper practice. Any party to the suit shall have the right, at any stage of the cause, to amend his pleadings so as to obviate the objection that his suit was not brought on the right side of the court. The cause shall proceed and be determined upon such amended pleadings."

Equity Rules 22 and 23 are as follows:

> "If at any time it appear that a suit commenced in equity should have been brought as an action on the law side of the court, it shall be forthwith transferred to the law side and be there proceeded with, with only such alteration in the pleadings as shall be essential."
>
> "If in a suit in equity a matter ordinarily determinable at law arises, such matter shall be determined in that suit according to the principles applicable, without sending the case or question to the law side of the court."

In Richardson v. McChesney, 218 U. S., the Court, on page 492, said:

> "The duty of the Court is limited to the decision of actual pending controversies, and it should not pronounce judgment upon abstract questions * * *."

It is the burden imposed by the judgment below from which the plaintiff in error desires to be relieved, a burden which deprives him of an action at law against the United States.

As indicated in Campbell v. California, 200 U. S. 87,

and as Chief Justice Taney said in Lord v. Veazie, 49 U. S. 255:

> "It is the office of courts of justice to decide the rights of persons and of property, when the persons interested can not adjust them by agreement between themselves—and to do this upon the full hearing of both parties."

As appears from Little v. Bowers, 134 U. S., 547, if there exists "an actual controversy, involving real and substantial rights, between the parties to the Record," the case can not be moot merely because a remedy which might have been granted when the appeal was taken, becomes impracticable through mere lapse of time, without affecting the existence of the cause of action. A satisfactory test of "moot" cases appears in Kimball v. Kimball, 174 U. S., 158, thus:

> "If it is impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal."

At Bar, a reversal of the judgment of the Court of Appeals would restore to the plaintiff his right to an action at law against either the defendant or the United States, of which right the judgment below has deprived him, by determining that he has no cause of action; a reversal will further relieve him of costs, and of liability on the bond given for the restraining order.

> "The duty of this court as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which can not affect the matter in issue in the case before it."
>
> American Book Co. v. Kansas, 193 U. S., 52.

**EXPIRATION OF CONTRACT PERIOD MAY BE A DEFENSE AGAINST EQUITABLE RELIEF, BUT CAN NOT WIPE OUT A CAUSE OF ACTION AT LAW.**

This distinction was drawn in Yazoo & Miss. Valley R. R. Co. v. Adams, 180 U. S., 28. In that case was a Motion to Dismiss on the ground that the purpose and object of the injunction bill had failed because of subsequent developments which rendered an injunction impracticable and impossible; the court held:

> "This is a defense to the merits of the case, and is no ground for the dismissal of the appeal." (Page 31.)

In Mills v. Green, 159 U. S., 651, the court said:

> "When, pending an appeal, an event occurred without the fault of either party, which renders it impossible for the court to grant any relief, it will dismiss the appeal; and such event, when not appearing in the record, may be proved by extrinsic evidence."

In the Mills Case on page 654 the Court collated the authorities supporting the proposition:

> "* * * the court nevertheless is not deprived of the authority whenever in its opinion justice requires it, to deal with the rights of the parties as they stood at the commencement of the suit * * *"

Wherefore it is manifest that an unsettled "controversy" exists over whether the plaintiff's rights were violated by the interruption of his contract and that this controversy is not settled or rendered "moot" because the period for the performance of the contract has expired.

Respectfully submitted,

DANIEL THEW WRIGHT,

*Attorney for Appellant.*

# CONTENTS.


| | Page. |
|---|---|
| STATEMENT OF THE CASE | 1–6 |
| ARGUMENT | 6–14 |
| I. The Case is Moot | 6–7 |
| II. The Suit is One Against the United States to which the United States has not Consented | 7–10 |
| III. In no Event is this a Suit within the Equity Jurisdiction, there being a Plain and Adequate Remedy at Law | 10–12 |
| IV. The Defendant as First Assistant Postmaster General was Authorized by the Contract to do the Thing Complained of, Namely, Discontinue the Use of Plaintiff's Automobiles | 12–14 |
| CONCLUSION | 14 |


## CASES CITED.


| | |
|---|---|
| *Codlin* v. *Kohlhausen*, 181 U. S. 151 | 7 |
| *Cunningham* v. *Macon & Brunswick R. R.*, 109 U. S. 446 | 8 |
| *District of Columbia* v. *Barnes*, 197 U. S. 146 | 10 |
| *Hagood* v. *Southern*, 117 U. S. 52 | 8 |
| *In re Ayers*, 123 U. S. 443 | 8 |
| *Louisiana* v. *McAdoo*, 234 U. S. 627 | 8 |
| *Minnesota* v. *Hitchcock*, 185 U. S. 373 | 8 |
| *Pennoyer* v. *McConnaughy*, 140 U. S. 1 | 8 |
| *Richardson* v. *McChesney*, 218 U. S. 487 | 7 |
| *United States* v. *Jones*, 131 U. S. 1 | 10 |
| *Watson* v. *Sutherland*, 72 U. S. 74 | 11 |


## STATUTES CITED.


| | |
|---|---|
| *Judicial Code*, sec. 24, par. 20; sec. 145, par. 1 | 9, 10 |
| *Jurisdiction, Court of Claims*, U. S. Comp. Stats., 1916, sec. 1136, vol. 2, p. 1468 | 9 |
| *Jurisdiction, District Courts*, U. S. Comp. Stats., 1916, sec. 991, vol. 1, pp. 553, 817 | 9 |
| *Postal Service Appropriations Act*, 38 Stat. 295, c. 33 | 3 |

# In the Supreme Court of the United States.

OCTOBER TERM, 1917.

JOSEPHUS WELLS, APPELLANT,
*v.*
DANIEL C. ROPER, FIRST ASSISTANT POSTMASTER GENERAL OF THE UNITED STATES, APPELLEE. | No. 103.

*APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.*

## BRIEF FOR APPELLEE.

### STATEMENT.

This is a suit to enjoin an alleged interference by Daniel C. Roper, First Assistant Postmaster General, with a contract between the plaintiff Wells and the Postmaster General acting for the United States.

The bill was filed January 27, 1915, in the Supreme Court of the District of Columbia. (R., 1.) On January 29, 1915, a temporary injunction was issued as prayed. (R., 15.) On February 10, 1915, a motion was made to dismiss the bill. (R., 16.)

This motion was sustained, and on April 5, 1915, the Supreme Court entered a final decree dissolving the temporary injunction and dismissing the bill. (R., 25.)

The case is here on appeal from a decree of the Court of Appeals of the District of Columbia affirming the decree of the Supreme Court. (R., 28, 35.)

The contract was made February 14, 1913. (R., 6.) By its terms the plaintiff agreed for a stipulated compensation to furnish during the period of four years beginning February 12, 1913, and ending February 11, 1917, four or more automobiles with chauffeurs, as ordered by the Postmaster of Washington, D. C., equipped according to specifications, for use in collecting and delivering mail at that place. (R., 6.)

Section 3 provides—

> That the said party of the second part [Wells] hereby consents and agrees that any or all of the equipments contracted for herein may be discontinued at any time upon ninety days' notice from the said party of the first part [the Postmaster General]. (R., 7.)

Section 11 provides that fines may be imposed by the Postmaster General for failure to meet the requirements of the contract, and that for repeated failures or for violations of the Postal Laws and Regulations the Postmaster General may annul the contract. (R., 7–8.)

Section 18 provides—

> That all acts done by the First Assistant Postmaster General in respect of this contract

> shall be deemed and taken, for all purposes, to be the acts of the Postmaster General, within the meaning and intent of this contract. (R., 9.)

By the Act making appropriations for the Postal Service, approved March 9, 1914, 38 Stat., 295, c. 33, the Postmaster General was authorized to use such portion of an appropriation of $2,600,000 as may be necessary

> for the purchase and maintenance of wagons or automobiles for and the operation of an experimental combined screened wagon and city collection and delivery service. (p. 300.)

Acting under this authority the Postmaster General determined it to be in the interest of the service to conduct such an experiment at Washington, D. C. (Pet., Ex. B, R., 12.)

In order to do so the Post Office Department deemed it essential to discontinue the use of the equipment furnished by the plaintiff under the contract of February 14, 1913. (Ibid.)

Accordingly, on November 2, 1914, the First Assistant Postmaster General apprised plaintiff of the situation and notified him under authority of Section 3 of the contract that the use of the automobiles furnished by him—

> will be discontinued at the close of business January 31, 1915, and the contract cancelled effective on that date. (Ibid.)

The plaintiff protested and was heard through counsel, but the Post Office Department adhered to its decision. (Pet., Ex. 3, R. 13.)

Thereupon this bill was filed, alleging that in fulfillment of the contract the plaintiff had bought, equipped and maintained at great expense five automobiles; that there was still need for this equipment in the collection and delivery of mails in Washington, D. C., and would be for the full term of the contract; that the Postmaster General had no authority to discontinue the use of the equipment or to cancel the contract except for delinquencies on the part of the plaintiff, and that none such were charged; that the defendant by the unlawful and wrongful exercise of his office as First Assistant Postmaster General was threatening to interfere with the performance of the contract; that having been designed and equipped for this special purpose the automobiles were fit for no other, and that for this and other reasons stated the plaintiff would suffer irreparable injury if the use of the automobiles should be discontinued before the expiration of the term of the contract. (R. 1–4.)

The bill prayed that the defendant be enjoined—

> from annulling or attempting to annul the said contract and from interfering or attempting to interfere between the plaintiff and the United States of America in the proper and lawful performance and execution of said contract by the plaintiff according to its terms. (R., 5.)

On behalf of the defendant the United States Attorney for the District of Columbia moved to dismiss the bill on the grounds, amongst others, 1st, that it was in legal effect a suit against the United

States beyond the jurisdiction of the court; 2nd, that if any right of the plaintiff had been violated or was threatened, he had a plain, adequate, and complete remedy at law; 3rd, that by the true construction of the contract Mr. Roper as First Assistant Postmaster General was authorized to discontinue the use of the plaintiff's equipment in the manner alleged. (R., 16.)

While the trial court apparently thought that the Post Office Department would be justified in discontinuing the use of any or all of the automobiles only by a falling off in the volume of the business for which they were to be used (R., 17–18), it dismissed the bill, holding it to be in legal effect a suit against the United States of a kind which the United States has not consented to (R., 19); that no irreparable injury to plaintiff was threatened (R., 20); and that the plaintiff's remedy was by suit against the United States in the Court of Claims (R., 22–23).

The Court of Appeals affirmed the decree dismissing the bill on the grounds stated by the trial court and also on the ground that the Post Office Department was authorized under the contract to discontinue the use of the automobiles furnished by the plaintiff, saying on that point—

> It appearing that Congress had made an appropriation for experimental service in Washington which might conflict with that in plaintiff's contract, the First Assistant Postmaster General notified him of the discontinuance of his equipment. This he had a right to do under the contract. It was within his discretion.

The fact that he accompanied it also with notice that the contract would be canceled is immaterial, for the reason that the discontinuance of the equipment, which was the sole service to be performed by the plaintiff, was itself a termination of the contract. (R., 34–35.)

## ARGUMENT.

I. THE CASE IS MOOT.

II. IT IS A SUIT AGAINST THE UNITED STATES TO WHICH THE UNITED STATES HAS NOT CONSENTED.

III. IN NO EVENT IS IT A SUIT WITHIN THE EQUITY JURISDICTION, THERE BEING A PLAIN AND ADEQUATE REMEDY AT LAW.

IV. THE DEFENDANT AS FIRST ASSISTANT POSTMASTER GENERAL WAS AUTHORIZED BY THE CONTRACT TO DO THE THING COMPLAINED OF, NAMELY, DISCONTINUE THE USE OF PLAINTIFF'S AUTOMOBILES.

### FIRST POINT.

#### THE CASE IS MOOT.

The sole object of the suit was to enjoin Mr. Roper as First Assistant Postmaster General from causing the Post Office Department to discontinue the use of plaintiff's equipment during the term of the contract.

The courts below, however, refused the injunction, and the term of the contract has now expired—it

was for four years, ending February 11, 1917. (*Supra*, p. 2.)

Therefore, even though this court upon an examination of the record should find itself in disagreement with the grounds on which the courts below dismissed the bill, the only relief sought has become impossible of application by lapse of time. "The thing sought to be prevented has been done, and cannot be undone by any judicial action. Under such circumstances there is nothing but a moot case."[1] *Richardson* v. *McChesney*, 218 U. S. 487, 492.

Moreover, according to plaintiff's theory, he is not suing the United States or the Post Office Department but Mr. Roper personally, to enjoin him from interfering "by the unlawful and wrongful exercise of his office as First Assistant Postmaster General" with the execution of plaintiff's contract with the United States. (R. 4.) Mr. Roper, however, is no longer First Assistant Postmaster General, and hence can no longer interfere with any right of plaintiff's by the unlawful and wrongful exercise of that office. For that reason also the case is moot. *Richardson* v. *McChesney*, 218 U. S. 487, 492–493; *Codlin* v. *Kohlhausen*, 181 U. S. 151, 152.

[1] The principle that a defendant in an injunction suit proceeds at his peril if he persists in the acts sought to be enjoined, and will be compelled, if the decision is ultimately against him, either to undo what he has wrongfully done or to answer in damages (*Wingert* v. *First National Bank*, 223 U. S., 670, 672), can not be made use of to transmute into a demand for damages a suit against a public officer the whole object of which was to enjoin him from doing a particular act in the exercise of his office. *Mills* v. *Green*, 159 U. S., 651, 653, 657.

## Second Point.

### THE SUIT IS ONE AGAINST THE UNITED STATES TO WHICH THE UNITED STATES HAS NOT CONSENTED.

While the United States is not formally named as a party, the direct effect of granting the relief prayed in the bill would have been, as held by both courts below (R. 19, 34), to compel specific performance by the United States of a contract between it and plaintiff. This makes the suit one against the United States. *Louisiana* v. *McAdoo*, 234 U. S. 627, 628-629; *Minnesota* v. *Hitchcock*, 185 U. S. 373, 387; *Pennoyer v. McConnaughy*, 140 U. S. 1, 9-10; *In re Ayers*, 123 U. S. 443, 502-503; *Hagood* v. *Southern*, 117 U. S. 52, 67, 69-70; *Cunningham* v. *Macon & Brunswick R. R.*, 109 U. S. 446, 457.

The attempt to get around this bar to the suit by treating the First Assistant Postmaster General as an interloper, wrongfully interfering between the United States and the plaintiff with the due performance of a contract which both parties desired to have performed, is fanciful.

The contract was entered into on the part of the United States through the Postmaster General. It expressly provided "that all acts done by the First Assistant Postmaster General in respect of this contract shall be deemed and taken, for all purposes, to be the acts of the Postmaster General." (R. 9.)

The act of the First Assistant Postmaster General in giving notice under section 3 of the discontinuance of the use of plaintiff's equipment was therefore the act of the Post Office Department—of the United

States. Through whom could the United States have acted if not through the Postmaster General or the First Assistant Postmaster General—both of whom for the purposes of this contract stood on the same footing?

If the contention of plaintiff were accepted it would follow that the United States, although claiming the right under the contract to discontinue the use of plaintiff's equipment upon 90 days notice, was nevertheless powerless to exercise that right because any agent through whom it might attempt to do so could be enjoined as a trespasser.

The cases cited by the plaintiff holding that public officers tortiously acting outside the scope of their authority or in pursuance of an unconstitutional statute may be enjoined have no application to the present situation, as the courts below pointed out. (R. 18–19, 34.)

Here the First Assistant Postmaster General in dealing with a contract relating to the affairs of the Post Office Department was acting within the scope of his office. He was authorized to deal with it by virtue of his office and by a provision in the contract itself. Even if it were true that he had erroneously interpreted the contract he would none the less have been dealing with a subject within the scope of his office.

The suit being thus one against the United States it only remains to note that it does not fall within any of the strictly limited classes of cases in which the United States has consented to be sued. (Jurisdiction, District Courts, U. S. Comp. Stats., 1916,

sec. 991, Vol. 1, pp. 553, 817; Judicial Code, sec. 24, par. 20. Jurisdiction, Court of Claims, U. S. Comp. Stats., 1916, sec. 1136, Vol. 2, p. 1468; Judicial Code, sec. 145, par. 1.) Nor is any claim made to the contrary.

In *United States* v. *Jones*, 131 U. S. 1, it was expressly held that the United States did not by the Act of March 3, 1887, 24 Stat. 505, c. 359, which is the present law on the subject, give its consent to be sued for specific performance. See also *District of Columbia* v. *Barnes*, 197 U. S. 146, 151–152.

## Third Point.

**IN NO EVENT IS THIS A SUIT WITHIN THE EQUITY JURISDICTION, THERE BEING A PLAIN AND ADEQUATE REMEDY AT LAW.**

But even had the United States given its consent to be sued for specific performance of its contracts in cases where that remedy would ordinarily lie, the plaintiff's case would not be helped because he has an adequate remedy outside the equity jurisdiction.

Under the Act of March 3, 1887, *supra*, suit may be brought against the United States in the Court of Claims on—

> all claims founded upon * * * any contract * * * with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, * * *. Judicial Code, sec. 145.

When such claims do not exceed $10,000, the same remedy may he had in the District Courts of the

United States. Judicial Code, sec. 24, as amended, Act, December 21, 1911, c. 5.

Assuming that the discontinuance of the use of plaintiff's automobiles was a breach of contract, there would be no greater difficulty than in the ordinary run of cases in measuring the damages in money.

Various collateral elements of damage were alleged in the bill, as loss of credit, injury to plaintiff's grocery business, etc., and plaintiff urges that as these exceed the measure of damages at law, an injunction is the appropriate remedy. The allegations are evidently framed with a view to bringing the case within the decision in *Watson* v. *Sutherland*, 72 U. S. 74 (opinion of the trial court, R. 20). In that case an injunction was issued to restrain the unlawful levying of writs of *fieri facias* on goods not belonging to the judgment debtor. As the goods were the stock in trade in a retail dry-goods business, their wrongful removal would have destroyed the owner's business and the scant measure of damages for the value of the goods would not have compensated him. Obviously the present case is entirely different. The fact that the plaintiff here had a grocery business has nothing to do with the contract between him and the Government or with the performance of it.

It is also said that the remedy in the Court of Claims is not adequate, because judgments of that Court require for their performance appropriations of public money which Congress may grant or refuse in its discretion. It is sufficient to say that this suggestion is based on the assumption that the United

States after consenting to be sued in certain classes of cases would then break faith by refusing to pay the judgments rendered against it.

Again, it is said that a suit in the Court of Claims is not a remedy *at law* in the strict sense of common law jurisprudence. The logic of this contention, as pointed out by the trial court, would lead to the conclusion that an injunction to restrain a breach of contract or to require specific performance would lie even though admittedly the judgment of the Court of Claims would afford full compensation for any damages sustained.

## Fourth Point.

**THE DEFENDANT AS FIRST ASSISTANT POSTMASTER GENERAL WAS AUTHORIZED BY THE CONTRACT TO DO THE THING COMPLAINED OF, NAMELY, DISCONTINUE THE USE OF PLAINTIFF'S AUTOMOBILES.**

Passing to the merits, the right to discontinue the use of plaintiff's automobiles was reserved to the Post Office Department in language free from doubt or qualification:

> The said party of the second part [the plaintiff Wells] hereby consents and agrees that any or all of the equipments contracted for herein may be discontinued at any time upon ninety days' notice from the said party of the first part [the United States]. (Contract, paragraph 3, R., 7.)

This provision was evidently intended to save the Government from being tied by a contractual obligation to use a particular equipment or kind of equip-

ment in the event that it should develop later that some other arrangement was better for the Postal Service. In entering into such a contract the plaintiff did no more than assume with his eyes open the ordinary business risk, for a valuable consideration, of undertaking to supply a service which was subject to termination when no longer wanted.

Plaintiff contends that notwithstanding its plain words to the contrary, paragraph 3 contemplated a discontinuance of the use of the automobiles only for cause, that is, for some default or delinquency, being intended as a means of safeguarding the Government against dilapidated equipment. (Appellant's Br., p. 21.)

This construction, besides reading something into the paragraph which is not there, is unreasonable because the contract contains other and much more appropriate provisions for the protection of the Government against the consequences of defaults and delinquencies on the part of the plaintiff. Thus the plaintiff's compensation could be withheld if the Postmaster General were satisfied that he was not complying with the contract; fines could be imposed by the Postmaster General for delinquencies; and for repeated failures or delinquencies the contract could be annulled. (Paragraphs 10, 11, 12, R., 7–8.)

Plaintiff especially urges that because the contract specified certain grounds for annulment (paragraphs 11, 14, R., 7–8), therefore it is not to be supposed that paragraph 3, empowering the Postmaster General "to discontinue equipment," was intended to

authorize him to discontinue the equipment except for the specified causes, since otherwise the Postmaster General could in effect annul the contract without any default on the part of plaintiff. Rather, we say, the fact that specific grounds of annulment for cause are elsewhere enumerated in the contract shows that paragraph 3 has reference to something else. The right to annul for defaults of plaintiff was entirely dissociated from the other right, reserved by paragraph 3, to discontinue the use of his automobiles. The one was contingent on the happening of defaults; the other depended solely on the internal exigencies of the Post Office Department. The two provisions served different purposes and there was no incompatibility between them.

**CONCLUSION.**

The decrees of the courts below should be affirmed.

G. CARROLL TODD,
*Assistant to the Attorney General.*

*December, 1917.*

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# WELLS *v.* ROPER, FIRST ASSISTANT POSTMASTER GENERAL OF THE UNITED STATES.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 103. Argued January 2, 1918.—Decided March 18, 1918.

The First Assistant Postmaster General, in accordance with a decision of the Postmaster General, undertook to terminate an existing contract for automobile mail service at Washington, D. C., to make place for a similar service to be conducted by the Department under a special appropriation, his action being based upon the supposed authority of the contract itself and being purely official, discretionary, and within the scope of his duties. *Held*, that a suit to restrain him from annulling the contract and from interfering with its further performance was in effect a suit against the United States, and was therefore properly dismissed.
44 App. D. C. 276, affirmed.

THE case is stated in the opinion.

*Mr. Daniel Thew Wright*, with whom *Mr. T. Morris Wampler* was on the briefs, for appellant.

*Mr. Assistant to the Attorney General Todd* for appellee.

MR. JUSTICE PITNEY delivered the opinion of the court.

This was a suit in equity brought in the Supreme Court of the District of Columbia for an injunction to restrain Daniel C. Roper, First Assistant Postmaster General, from annulling a contract theretofore made between plaintiff and the Postmaster General acting for the United States, and from interfering between plaintiff and the United States in the proper performance and execution of the contract by plaintiff. The Supreme Court sustained a

motion to dismiss the bill, its decree to that effect was affirmed by the Court of Appeals of the District of Columbia (44 App. D. C. 276), and plaintiff appeals to this court.

The contract was made February 14, 1913, and by it plaintiff agreed for a stated compensation to furnish, during a period of four years, a number of automobiles (with chauffeurs) specially equipped according to specifications, for use in collecting and delivering mail at Washington, D. C. One of its provisions (the third) was a stipulation that "any or all of the equipments contracted for herein may be discontinued at any time upon ninety days' notice from the said party of the first part"— meaning the Postmaster General.

Another was: "18. That all acts done by the First Assistant Postmaster General in respect of this contract shall be deemed and taken, for all purposes, to be the acts of the Postmaster General, within the meaning and intent of this contract."

Plaintiff expended considerable sums of money and incurred substantial obligations in providing automobiles and other special equipment necessary for the performance of the contract, and continued to perform it for nearly two years. Then the Postmaster General, acting under a provision of an appropriation act approved March 9, 1914, c. 33, 38 Stat. 295, 300, by which he was authorized in his discretion to use such portion of a certain appropriation as might be necessary "for the purchase and maintenance of wagons or automobiles for and the operation of an experimental combined screen wagon and city collection and delivery service," determined it to be in the interest of the public service that such an experiment should be conducted at Washington, D. C., and in order to do this deemed it necessary to discontinue the service then being performed by plaintiff. Accordingly the First Assistant Postmaster General notified plaintiff in writing that it was essential for the purpose mentioned that his

contract should be canceled, and that "under the third stipulation of the contract the use of all of the automobiles furnished thereunder will be discontinued at the close of business January 31, 1915, and the contract canceled effective on that date." Notwithstanding protest by plaintiff, this decision was adhered to, and the present suit was commenced.

Both courts held it to be essentially and substantially a suit against the United States and therefore beyond the jurisdiction of the court, and in this view we concur. The effect of the injunction asked for would have been to oblige the United States to accept continued performance of plaintiff's contract and thus prevent the inauguration of the experimental service contemplated by the Act of 1914—a direct interference with one of the processes of government. The argument to the contrary assumes to treat defendant not as an official but as an individual who although happening to hold public office was threatening to perpetrate an unlawful act outside of its functions. But the averments of the bill make it clear that defendant was without personal interest and was acting solely in his official capacity and within the scope of his duties. Indeed, it was only because of his official authority that plaintiff's interests were at all endangered by what he proposed to do.

That the interests of the Government are so directly involved as to make the United States a necessary party and therefore to be considered as in effect a party, although not named in the bill, is entirely plain. And the case does not fall within any of the exceptions to the general rule that the United States may not be sued without its consent, nor its executive agents subjected to the control of the courts respecting the performance of their official duties. It cannot successfully be contended that any question of defendant's official authority is involved; it is a mere question of action alleged to be inconsistent

with the stipulation under which it purported to be taken; nor can it be denied that the duty of the Postmaster General, and of the defendant as his deputy, was executive in character, not ministerial, and required an exercise of official discretion. And neither the question of official authority nor that of official discretion is affected, for present purposes, by assuming or conceding, for the purposes of the argument, that the proposed action may have been unwarranted by the terms of the contract and such as to constitute an actionable breach of that contract by the United States. See *Noble* v. *Union River Logging Railroad*, 147 U. S. 165, 171, and cases cited; *Belknap* v. *Schild*, 161 U. S. 10, 17, 18; *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, 108; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 620.

The United States has consented to be sued in the Court of Claims and in the District Courts upon claims of a certain class, and not otherwise. Hence, without considering other questions discussed by the courts below or raised by appellant in this court, we conclude that the dismissal of the bill was not erroneous.

*Decree affirmed.*